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No. 92-1012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,
Petitioner
v.
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Vermont, through its Department of Environmental Conservation, has exceeded its authority under § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, by conditioning a water quality certification for a federally licensed hydroelectric project on scenic aesthetic and recreation requirements wholly unrelated to the protection of water quality.

2. Whether § 401 of the CWA allows the states unlimited authority to condition the operation of projects subject to the Federal Power Act ("FPA") on certification requirements not related to water quality, and thereby repeals by implication the comprehensive regulatory scheme established by the FPA for federal licensing of hydroelectric projects.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
A. Statutory and Regulatory Background	4
1. The Federal Power Act	4
2. The Clean Water Act	6
a. The § 401 Certification Requirement	6
b. The EPA's Role in Establishing Water Quality Standards for § 401 Certifications	7
c. Vermont's Role Under §§ 401 and 303	9
B. The Gilman Hydroelectric Project	10
C. Proceedings Below	12
1. Administrative Action	12
2. Judicial Proceedings	15
REASONS FOR GRANTING THE PETITION	16
A. This Court Should Resolve The Important Federal Question Concerning The Scope Of A State's Certification Authority Under § 401 Of The Clean Water Act	16
B. The Plain Language Of The Clean Water Act Makes Clear That Vermont Is Not Authorized To Impose Conditions On A § 401 Water Quality Certification Which Are Unrelated To A Discharge Of Pollutants	21
C. Vermont's Expansive Reading Of § 401 Would Subvert the FPA's Comprehensive Federal Licensing Scheme	25
CONCLUSION	29

TABLE OF AUTHORITIES

CASES — Page

Arnold Irrigation Dist. v. Department of Envtl. Quality, 717 P.2d 1274 (Or. App. 1986) 19
Arkansas v. Oklahoma, —— U.S. ——, 112 S.Ct. 1046 (1992) 22, 23, 25
California v. FERC, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990) 3, 28
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 27
Coleman v. Thompson, —— U.S. ——, 111 S.Ct. 2546 (1991) 17
deRham v. Diamond, 343 N.Y.S.2d 84, 295 N.E.2d 763 (N.Y. 1973) 20
First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152 (1946) 3, 5, 27, 28
FPC v. Oregon, 349 U.S. 435 (1955) 5, 28
Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991) .. 19
Michigan v. Long, 463 U.S. 1032 (1983) 17
Morton v. Mancari, 417 U.S. 525 (1974) 27
National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 23
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 27
Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190 (1983) 27
Pennsylvania Dept. Envtl. Resources v. Harrisburg, 133 Pa. Commw. 577 A.2d 563 (1990) 20
In re *Power Auth. v. Williams*, 457 N.E.2d, 60 N.Y.2d 315 (1983) 20
Proffitt v. Rohm & Haas, 850 F.2d 1007 (3rd Cir. 1988) 19
Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982) 19
Summit Hydropower v. Commissioner of Envtl. Protection, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Superior Court of Connecticut 1992) 19
United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) 19

TABLE OF AUTHORITIES—Continued

Page

Vermont v. New Hampshire, 289 U.S. 593 (1933) .. 11
Watt v. Alaska, 451 U.S. 259 (1981) 27

ADMINISTRATIVE DECISIONS

Carex Hydro, 52 FERC ¶ 61,216 (1990) 7, 19
Central Maine Power Co., 52 FERC ¶ 61,033 (1990) 7, 17, 18, 19
Georgia Pacific Corp., 59 FERC ¶ 62,350 (1992) 12
Gilman Paper Co., 33 F.P.C. 1021 (1965) 11, 12
Gilman Paper Co., 40 F.P.C. 1021 (1970) 12
Town of Summersville, 60 FERC ¶ 61,291 (1992) .. 7, 19

STATUTES

Federal Power Act, 16 U.S.C. §§ 791-828 (1988)

§ 4(e), 16 U.S.C. § 797(e) 4, 5
§ 10(a)(1), 16 U.S.C. § 803(a)(1) 5
§ 10(j), 16 U.S.C. § 803(j) 6, 14, 28
§ 15, 16 U.S.C. § 808 ..... 4, 12
§ 15(a)(2)-(3), 16 U.S.C. § 808(a)(2)-(3) 5
§ 23(b), 16 U.S.C. § 897(b) 4

Clean Water Act ("CWA"), 33 U.S.C. § 1251-2623 (1988)

§ 101, 33 U.S.C. § 1251 21
§ 102(b)(6), 33 U.S.C. § 1252(b)(6) 26, 27
§ 301, 33 U.S.C. § 1311 ..... 6, 7, 21, 22
§ 302, 33 U.S.C. § 1312 ..... 6, 7, 21, 22
§ 303, 33 U.S.C. § 1313 ..... 6, 7, 9, 21, 22, 24
§ 303(c)(2), 33 U.S.C. § 1313(c)(2) 8
§ 306, 33 U.S.C. § 1316 ..... 6, 7, 21, 22
§ 307, 33 U.S.C. § 1317 ..... 6, 7, 21, 22
§ 401, 33 U.S.C. § 1341 ..... *passim*
§ 401(a), 33 U.S.C. § 1341(a) 6, 7, 22
§ 401(a)(1), 33 U.S.C. § 1341(a)(1) 6, 7, 21, 22
§ 401(d), 33 U.S.C. § 1341(d) ..... *passim*
§ 402, 33 U.S.C. § 1342 ..... 13, 23
§ 502, 33 U.S.C. 1362(16) 21, 23, 24

TABLE OF AUTHORITIES—Continued

	Page
Vermont Water Pollution Control Act, Vt. Stat. Ann. tit. 10, Ch. 47 (Supp. 1992)	9
Vt. Stat. Ann. tit. 10, § 1004	9
Vt. Stat. Ann. tit. 10, § 1251a(a)	9, 24
Vt. Stat. Ann. tit. 10, § 1252	9
Vt. Stat. Ann. tit. 10, § 1252(a)	9, 22
REGULATIONS	
18 CFR §§ 380.1-380.14	6
18 CFR § 380.3(c)(1)	6
18 CFR Part 4	6
18 CFR § 4.38	29
18 CFR Part 16	6
18 CFR § 16.8	29
40 CFR Part 131	9, 24
40 CFR § 131.2	7, 8, 22, 24
40 CFR § 131.3(b)	8
40 CFR § 131.5	22, 24
40 CFR § 131.6	22, 24
40 CFR § 131.6(a)	8
40 CFR § 131.6(c)	8
40 CFR § 131.6(f)	8
40 CFR § 131.10	22, 24
40 CFR § 131.11	22, 24
Vermont Water Quality Standards	
VWQS Section 3-01	10
VKQS Section 3-01.1.a	15
VWQS Section 3-02	10
VWQS Section 3-03	10, 24, 25
VWQS Section 3-04	10, 17, 24
MISCELLANEOUS	
Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986)	28
Electric Power Research Institute, *Lessons Learned in Hydro Relicensing (1984-1989): Trends, Costs, and Recommendations* § 2-1 (May 1991)	4

TABLE OF AUTHORITIES—Continued

Page

Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook* 1 (April 1990) 4

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 66 Stat. 816 (1972) 28

G. Douglas Essy, *Hydroelectric Facilities Licensing—A FERC Jurisdictional Primer*, 1 Energy L.J. 67 (1980) 4

Hydropower Disputes: A Battle of the Endangered Salmon, Cogeneration & Resource Recovery, May/June 1991, at 22 4

National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 5

New Hampshire Water Quality Management Plan, Connecticut River Basin, New Hampshire Water Supply and Pollution Control Commission (1979) 15

Richard T. Hunt & Judith Mohsberg, *Relicensing Entanglements*, Independent Energy, January 1991, at 48 4

S. Rep. No. 1236, 92nd Cong., 2d Sess. 101 (1972) .. 26

Special Supplement 1992 Edition, Hydrowire, §§ 7-9, August 1992 ..... 4, 18

The Gilman Project, FERC No. 2392, Application for New License, Major Water Power Project, Five Megawatts or Less, December 1988 ..... 11, 12

The Gilman Project, FERC No. 2392, Application for Section 401 Water Quality Certification, August 1988 13

Water Quality Certificate (Pursuant to Section 401 of The Clean Water Act): Gilman Project—FERC No. 2392, N.H. Dept. of Environmental Services, Oct. 22, 1988 14

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PETITION FOR A WRIT OF CERTIORARI

The Simpson Paper (Vermont) Company (hereinafter "Simpson") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Vermont in this case.[1]

OPINIONS BELOW

The opinion of the Supreme Court of the State of Vermont ("Vermont Supreme Court"), No. 91-530, issued September 14, 1992 (App. 1a-4a); the opinion of the Vermont Superior Court, No. S473-89 WnCa, issued October 2, 1991 (App. 5a-18a); and the Water Quality Certification issued by the Vermont Department of En-

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[1] Simpson Paper (Vermont) Company is a wholly owned subsidiary of Simpson Paper Company, which is a wholly owned subsidiary of Simpson Investment Company.

vironmental Conservation ("Vermont DEC"), issued July 28, 1989 (App. 19a-28a), are not officially reported.

JURISDICTION

The judgment of the Vermont Supreme Court was entered on September 14, 1992. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Sections 301, 302, 303, 306, 307, 401 and 510 of the Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, 1341 and 1370; and §§ 4(e), 10(a)(1), 10(j) and 15(a)(2)-(3) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a)(1), 803(j) and 808(a)(2)-(3), are reproduced in Appendix D.

STATEMENT

This case involves an attempt by the State of Vermont to use its water quality certification authority, delegated to it pursuant to § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, to impose far reaching operational conditions—unrelated to water quality—on the continued existence of a hydroelectric project licensed by the Federal Energy Regulatory Commission ("FERC"). State courts are in conflict on this issue. *See infra* pp. 19-21.

The Vermont DEC issued a § 401 water quality certification in connection with Simpson's application to FERC for relicensing of its Gilman Hydroelectric Project ("Gilman Project") on the Connecticut River. The project provides power to Simpson's Centennial Paper Mill, located in Gilman, Vermont. The certification contained a number of conditions, including requirements for upstream and downstream fish passage facilities and a requirement that a minimum flow of 210 cubic feet per second ("cfs") be spilled over the dam continuously

from June 1 to October 15 each year. The Vermont DEC based the spill requirement both on purported water quality concerns and on a desire to enhance scenic aesthetics for persons engaged in recreation at the site. The Vermont Supreme Court upheld the DEC's spill condition, solely on the ground that "aesthetics" and "recreation"—in and of themselves—were appropriate grounds on which to justify the spill condition under § 401.

Under § 401(d), a state water quality certification becomes a condition to any FERC hydroelectric license (or other federal license or permit). FERC, and the federal courts, have no authority to review the certification's requirements even if they exceed the scope of the state's delegated authority under § 401. The licensee's remedy lies only in the state courts and ultimately this Court.

The Vermont Supreme Court's holding is not within the scope of § 401. Its ruling is contradicted by the plain language and the purposes of that provision. Vermont's broad construction completely undermines the Federal Power Act's ("FPA's") scheme for federal licensing of hydroelectric projects. It would supplant FERC's comprehensive planning and licensing responsibilities with respect to new and existing projects, including the nearly 200 existing projects currently in the FERC relicensing process, by allowing the 50 states virtually unlimited authority to restrict operation of hydroelectric projects for reasons not directly linked to water quality. Congress did not intend § 401 to undo the basic scheme of the FPA by authorizing unrestrained intervention by the states into the licensing process. *California v. FERC*, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946).

A. Statutory and Regulatory Background

1. *The Federal Power Act*

Under the FPA, FERC has exclusive authority to issue licenses for the vast majority of new and existing hydroelectric projects. FPA §§ 4(e), 23(b), 16 U.S.C. §§ 797 (e), 817 (1988).[2] This authority includes original licenses and license renewals, known as "new licenses," which must be obtained when the original license term expires. FPA § 15, 16 U.S.C. § 808 (1988). Between 1991 and the year 2000, FERC anticipates the relicensing of about 320 hydropower projects, or fully 17 percent of the facilities currently under its jurisdiction.[3] Between 1990 and 1993 alone, the licenses for nearly 200 hydropower plants are due to expire, representing over 2,200 MW of electric generating capacity.[4] Most of these are the subject of applications now pending at FERC.[5]

The FPA requires that projects licensed by FERC be "best adapted to a comprehensive plan" for improving or developing the waterway, taking into account such potentially competing factors as needed for the project's power, energy conservation, navigation, irrigation, flood control, water supply, fish and wildlife protection, recrea-

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[2] G. Douglas Essy, *Hydroelectric Facilities Licensing—A FERC Jurisdictional Primer*, 1 Energy L.J. 67, 67-68 (1980).

[3] Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook* 1 (April 1990); *Hydropower Disputes: A Battle of the Endangered Salmon*, Cogeneration & Resource Recovery, May/June 1991, at 22, 24 ("More than half of these licenses will expire in 1993.").

[4] Electric Power Research Institute, *Lessons Learned in Hydro Relicensing (1984-1989): Trends, Costs, and Recommendations* 2-1 (May 1991); Richard T. Hunt & Judith Mohsberg, *Relicensing Entanglements*, Independent Energy, January 1991, at 48.

[5] *Special Supplement 1992 Edition*, Hydrowire, §§ 7-9, August 1992.

tional opportunities, and other aspects of environmental quality. FPA §§ 4(e), 10(a)(1), 16 U.S.C. §§ 797(e), 803(a)(1) (1988).

Section 15 of the FPA sets forth additional considerations which apply to existing licensed projects seeking a new license. These include the cost and availability of alternative sources of power, among others. They also include, in the case of an applicant such as Simpson (which uses the power for its own industrial facility), the effects of the project on the operation and efficiency of the industrial facility, its workers, and the community. FPA § 15(a)(2)-(3), 16 U.S.C. § 808(a)(2)-(3) (1988).

Congress' intent in enacting the Federal Water Power Act of 1920, the FPA's predecessor statute, was to secure "a comprehensive development of natural resources". *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946). The Court has observed that the key to that rational development is centralization of licensing authority in one federal administrative body which would exercise a consistent and comprehensive planning role. *Id.* at 164, 182. Absent express modification by federal legislation of this pervasive jurisdiction over licensing of hydroelectric projects, FERC's jurisdiction is exclusive. *FPC v. Oregon*, 349 U.S. 435, 446 (1955). These principles recently were reconfirmed in *California v. FERC*, 495 U.S. 490 (1990).

Before issuing a license under the FPA, FERC must weigh potential environmental impacts of a proposed project—or, in the case of a license renewal, impacts of continued operation. In addition, under its regulations implementing the National Environmental Policy Act of 1969,[6] FERC assesses potential impacts on water quality, fish, wildlife and botanical resources, historic and archeological resources, recreational resources, land manage-

[6] Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. §§ 4321-4347 (1988)).

ment, and aesthetics.[7] FERC also must include in licenses conditions for the protection and enhancement of fish and wildlife, and must adopt recommendations of federal and state fish and wildlife agencies, unless it expressly finds them to be inconsistent with the purposes and requirements of the FPA. FPA § 10(j), 16 U.S.C. § 803(j).

2. *The Clean Water Act*

a. *The § 401 Certification Requirement*

Section 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1) (1988), requires an applicant for a federal license or permit for any activity which may result in a discharge into navigable waters of the United States to obtain a certification (or waiver thereof) from the state in which the discharge originates. The state must certify that the discharge will comply with the sections of the CWA specifically enumerated in § 401(a).[8] Each of the enumerated sections addresses discharges of pollutants. Sections 301 and 302 set standards for effluent limitations. Section 303 governs state water quality standards and implementation plans. Section 306 sets national standards of performance for the control of discharges. Section 307 sets effluent pretreatment standards and prohibits the discharge of certain effluents.

Section 401(d) of the CWA, 33 U.S.C. 1341(d) (1988), confines a state certification issued pursuant to § 401(a)(1) to water quality factors. It directs that state certifications shall impose limitations and monitoring requirements necessary to ensure compliance with:

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[7] 18 CFR §§ 380.1-380.14 (1982). The types of information FERC must consider are set forth in FERC's regulations establishing requirements for license applications. 18 CFR Parts 4, 16. *See* 18 CFR § 380.3(c)(1).

[8] These are §§ 301, 302, 303, 306, and 307, codified respectively at 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317.

> any applicable effluent limitations and other limitations, under section [301] or [302] of this title, standard of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this title, and with any other appropriate requirement of State law set forth in such certification . . . .

Under § 401(d), any such limitations and requirements then become conditions on the FERC license or other federal permit for the project. FERC has ruled that it has no authority to reject or even revise conditions in a state water quality certification even if they are outside the scope of § 401, and that only the state courts may review such certifications.[9]

b. *The EPA's Role in Establishing Water Quality Standards for § 401 Certifications*

One of § 401(a)'s specifically enumerated sections is section 303. Section 303 requires a state to establish water quality standards to be approved by the United States Environmental Protection Agency ("EPA"). EPA requires the state standards to meet the minimum applicable requirements set forth in the CWA, including but not limited to §§ 301, 302, 306 and 307. EPA's parameters for state water quality standards have as their purpose "to protect public health or welfare, enhance the quality of water and serve the purposes of the Act. . . ."[10] 40 CFR § 131.2 (1992). EPA's definition

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[9] *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992), rehearing granted for purpose of further consideration; *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770-771 (1990); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

[10] 40 CFR § 131.2 (1992) also states EPA's view of the purposes of the CWA:

> States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the [CWA]. 'Serve the purposes of the [CWA]' (as

of a water quality standard states: "A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 CFR 131.2 (1992). This definition results in a two-step format for state water quality standards. The first step requires the state to designate the uses desired for a particular body of water. The second step involves establishment of "criteria"—objective, measurable standards—the implementation of which should ensure attainment of water quality sufficient to achieve and protect the designated uses.

The first-step regulation, 40 CFR § 131.6(a) (1992), directs a state to submit for EPA approval water quality standards which establish "use designations" pursuant to CWA § 303(c)(2). The second-step regulation, 40 CFR § 131.6(c) (1992), directs that the state's standards must include "[w]ater quality criteria sufficient to protect the designated uses." The criteria are defined as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." 40 CFR 131.3(b) (1992). These criteria must be supported by information sufficient to ensure the "adequacy of the scientific basis of the standards." 40 CFR § 131.6(f) (1992).

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defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water and take into consideration their [sic] use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

c. *Vermont's Role Under §§ 401 and 303*

The Vermont DEC determines whether to issue § 401 certifications in that state. Vt. Stat. Ann. tit. 10, § 1004 (Supp. 1992). In accordance with CWA § 303, Vermont's Water Resources Control Board has established "Vermont Water Quality Standards" which were approved by the EPA and became effective January 8, 1987[11] pursuant to the Vermont Water Pollution Control Act, Vt. Stat. Ann. tit. 10, Chapter 47. This statute requires that Vermont's water quality standards conform to EPA's requirements concerning the scope and structure of state water quality standards under § 303 (*i.e.*, 40 CFR Part 131).[12]

In accordance with EPA's requirements, the state classifies its waters according to their suitability for particular uses. Vt. Stat. Ann. tit. 10, § 1252 (Supp. 1992).[13] Vermont's Water Quality Standards ("VWQS") provide

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[11] The 1987 Vermont Water Quality Standards were in effect at the time the Section 401 certification for the Gilman Project was issued. They subsequently have been revised.

[12] Vt. Stat. Ann. tit. 10, § 1251a(a) (Supp. 1992) effectively requires that Vermont's Water Quality Standards, as promulgated by the Water Resources Board, be "approvable" under Public Law 92-500 (the 1972 Amendments to the CWA) and thus approvable pursuant to CWA § 303.

[13] Section 1252(a) provides:

> (a) The state adopts, for the purposes of classifying its waters, the following classes and definitions thereof:
>
> Class A. Suitable for public water supply with disinfection when necessary. Character uniformly excellent.
>
> Class B. Suitable for bathing and recreation, irrigation and agricultural uses; good fish habitat; good aesthetic value; acceptable for public water supply with filtration and disinfection.
>
> Class C. Suitable for recreational boating, irrigation of crops not used for consumption without cooking; habitat for wildlife and for common food and game fishes indigenous to the region; and such industrial uses as are consistent with other class "C" uses.

"management objectives" setting forth the State's desired values and uses for the different classifications.[14]

The VWQS further include water quality "criteria" required by EPA that provide objective standards for regulating levels of pollutant discharges in order to achieve the "uses" and "values" set forth in the Standards. Vermont has adopted both general water quality criteria, which pertain to all waters, and specific criteria which vary depending on the classification of the waters.[15] The criteria look to scientifically ascertainable elements. For example, for Class B and Class C waters (the types at issue here), they specify levels of pH (maintain between values of 6.5 and 8.0); fecal coliform (not more than 200 organisms per 100 milliliters); and color (not more than 25 standard color units), among others. Aesthetic factors linked to measurable water quality—such as "color," or "taste and odor"—are included within the criteria. Non-water quality factors such as scenic aesthetic values are not.

B. The Gilman Hydroelectric Project

The Gilman Project is 4.85 MW run-of-river[16] hydroelectric facility located at Gilman, Vermont on the Connecticut River, the navigable interstate boundary water

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[14] *See* VWQS, Sections 3-02 to 3-04.

[15] General water quality criteria are established for "Dissolved Oxygen," "Temperature," "Nutrients," "Aquatic Habitat," "Sludge deposits or solid refuse," and "Settleable solids, floating solids, oil, grease, scum, or total suspended solids." VWQS Section 3-01. Specific water quality criteria are established for "Ph," "Turbidity," "Fecal Coliform," "Color," and "Taste and Odor." VWQS Sections 3-02 to 3-04.

[16] "Run-of-river" facility means that the Project discharges water at the same rate that water enters the Project's impoundment upstream of the dam. Although the Project has a small dam and impoundment, it does not operate in a store-and-release cycle mode. App. 20a.

between Vermont and New Hampshire.[17] App. 19a-20a; *Gilman Paper Co.*, 33 F.P.C. 1021 (1965). Vermont classifies the waters above the dam as "Class B," which includes "good aesthetic value," and the waters below the dam as "Class C," which does not include aesthetic value. App. 11a, 20a; *see supra* note 13.

Simpson owns and operates the facility, which provides power for Simpson's adjacent Centennial Paper Mill. The Project dam, which spans the river from the New Hampshire side to the power house and is about 300 feet wide, is located entirely in New Hampshire waters.[18] Spills are regulated by a hydraulic-controlled crest gate approximately 25 feet in width which is part of the dam. The powerhouse, which is next to the dam, straddles the Vermont-New Hampshire boundary. App. 19a. The paper mill is in Vermont.[19]

The Gilman Project produces about 26 million kilowatt hours per year on an average annual basis,[20] which is about 41 percent of the paper mill's electric requirements.[21] Any additional electric energy (not otherwise supplied by Simpson's onsite wood-waste cogeneration facility) is purchased from the New England Power Company, which in turn purchases excess energy from the Gilman Project when Simpson's mill is down for maintenance or repair.[22]

Paper making is an energy intensive process. The electricity which the Project supplies to the mill is an

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[17] The boundary between Vermont and New Hampshire is set at the historic low water mark on the Vermont side. *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933).

[18] *See The Gilman Project, FERC No. 2392, Application for New License, Major Water Power Project, Five Megawatts or Less*, December 1988 ("1988 Relicensing Application"), at A-1.

[19] *Id.*

[20] *Id.* at 1.

[21] *Id.* at 7.

[22] *Id.* at 4.

important factor enabling the mill to survive in the highly competitive paper industry.[23] The power produced by the Project results in substantial cost savings for the mill, which otherwise would have to purchase more electricity from the local utility.[24] When the Project turbines are being used to full capacity, any water spilled over the crest gate is unavailable for power productions except at higher flows. Thus, the DEC's spill requirement would limit power production and force Simpson to purchase additional commercial power.

The Federal Power Commission issued an initial license for the Project to Simpson's predecessor in 1965.[25] That license expired in 1990. In December 1988 Simpson's predecessor applied to FERC for a new license under FPA § 15.[26] FERC has deferred issuance of the new license pending Simpson's appeal of the Vermont § 401 certification.

C. Proceedings Below

1. *Administrative Action*

In anticipation of the relicensing application to FERC, Simpson's predecessor in August 1988 filed an application

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[23] *Id.* at 1-2.

[24] *Id.* at 4.

[25] *Gilman Paper Co.*, 33 FPC 1021 (1965). The initial license was issued to the Gilman Paper Company in 1965, retroactively effective to 1941, although a dam and mill were first constructed at the site about 1900. It sold the project to Georgia-Pacific Corporation, *Gilman Paper Co.*, 43 FPC 139 (1970), which owned the Gilman Project when this litigation was initiated. Simpson subsequently purchased the Project and FERC transferred the license to Simpson. *Georgia-Pacific Corp.*, 59 FERC ¶ 62,350 (1992). For purposes of this Petition, all further references to Simpson will include both Simpson and Georgia-Pacific Corporation.

[26] *See The Gilman Project, FERC No. 2392, Application for New License, Major Water Power Project, Five Megawatts or Less*, December 1988.

for § 401 certification with the Vermont DEC.[27] Prior to the filing, the DEC had advised Simpson's predecessor that it intended to impose a continuous spill requirement.[28] After a preliminary meeting with counsel for the licensee, the Commissioner of the Vermont DEC expressed concern in a memorandum to the DEC's director that the scope of the state's certification authority under 401 might limit the DEC's ability to extract concessions:

> [T]he policy issue before us is how much to extract from Georgia Pacific [now Simpson] during relicensing. I think we have some leverage through the 401 certificate, but the law on the scope of that authority has not been settled. I would hope we could get what we want, or at least what we can fairly expect, without having to litigate that issue, which could be a major battle of national importance.[29]

The DEC had indicated a concern over dissolved oxygen ("DO") levels in the river reach below the dam during low flow periods. The licensee attempted to address this concern by conducting studies of DO above and below the dam and by drafting a water quality management plan for monitoring DO and responding to low levels through controlled spillage.[30] However, on July 28, 1989,

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[27] *See The Gilman Project, FERC No. 2392, Application for Section 401 Water Quality Certification*, August 1988. The Gilman Centennial Mill also received a renewal of its discharge permit under section 402 of the CWA from the Vermont Agency for Natural Resources on March 15, 1989. The section 402 permit regulates wastewater discharges from the paper making process.

[28] Letter of April 23, 1987 from Thomas Willard, Director of DEC, to William Ernst, then General Manager of Simpson's predecessor.

[29] Memorandum of April 25, 1988 from Patrick A. Parenteau, DEC Commissioner, to David L. Clough, Director, DEC Water Quality Division.

[30] The first draft of a management plan was submitted to DEC by letter of January 16, 1987 from Mr. Ernst to Mr. Willard. The

before Simpson had finished and submitted a final management plan, the DEC issued its § 401 certification.

The certification contained several conditions. These included, among others, requirements for upstream and downstream fish passages,[31] and a condition requiring the licensee to release 210 cubic feet per second ("cfs") in a continuous flow over the dam from June 1 through October 15 of each year. The DEC maintained that during critical low flow conditions this 210 cfs continuous spill requirement was required to insure minimum levels of DO in the river at a potential DO "sag" some miles downstream. App. 21a-24a. The DEC also determined that the spill would enhance aesthetics and recreational use of the river reach. App. 25a-26a. It made no finding, however, that the Gilman Project affects any measurable aesthetic properties of the water itself, or that the Project's "discharge" contains pollutants which affect aesthetic values or recreational uses.

In the meantime, New Hampshire, in whose waters the mandatory spill actually would occur (since the crest gate and dam are in that state), issued a § 401 certification finding that the Project met that state's water quality standards in all respects. New Hampshire's certification did not contain a spill condition or any other operating restriction.[32] At the time, New Hampshire's

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DEC stated that it would not consider a water quality management plan. Letter of April 23, 1987 from Mr. Willard to Mr. Ernst.

[31] While Simpson believed that the fish passage conditions imposed by the DEC also were beyond the scope of the DEC's section 401 authority, it chose not to contest them because it had already proposed installation of a downstream fish passage in the FERC relicensing proceeding in an attempt to anticipate FERC's requirements under § 10(j) of the FPA. 1988 Relicensing Application at E2-5 to E2-6.

[32] *Water Quality Certificate (Pursuant to Section 401 of The Clean Water Act): Gilman Project—FERC No. 2392*, N.H. Dept. of Environmental Services, Oct. 22, 1988.

standards concerning DO in the reach below the dam were more stringent than Vermont's.[33]

2. *Judicial Proceedings*

Simpson appealed the 210 cfs continuous spill condition to the Vermont Superior Court for Washington County, contending that the continuous spill condition was not needed to ensure water quality. Simpson also challenged the condition as being beyond the scope of state authority under CWA § 401.

The Superior Court affirmed the continuous spill requirement on two grounds: in order to guarantee compliance with DO levels below the dam, and to maintain scenic aesthetics. App. 5a-18a. It deferred to the DEC's conclusion that "the specified continuous flow was required to safeguard aesthetic appeal of the river to the numerous persons who use the river for recreation during the specified time period." According to the court, "[t]he aesthetic determination forms a strong independent basis upon which to uphold" the continuous spill requirement. App. 14a. However, the court did not cite any objective criteria or specific evidence related to the visual "aesthetic" qualities of the river which would be protected by the continuous spill condition, or even describe what the actual scenic aesthetic impact of the spill might be. Its conclusion appeared to be predicated on the notion that general improvement of the scenic vista at the Project site, as opposed to the aesthetic quality of the water itself, was a permissible justification for the spill condition under CWA § 401. App. 3a-4a.

Simpson appealed the Superior Court's judgment to the Vermont Supreme Court, contending, *inter alia*, that it was beyond the DEC's authority under CWA § 401 to base a spillage requirement on aesthetic and recreational

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[33] *Compare*, VWQS, Section 3-01.1.a (1987) and New Hampshire Water Quality Management Plan, Connecticut River Basin, New Hampshire Water Supply and Pollution Control Commission (1979).

goals unsupported by objective evidence. *Appellant's Brief*, Docket No. 91-530, pp. 46-49, March 27, 1992. Simpson also appealed on the grounds that there was no foundation for the spill requirement in terms of DO-related water quality factors. *Id.*, pp. 33-46. Simpson showed that the spill condition imposed substantial economic costs—estimated at $120,000 per year[34]—without any basis in objective water quality standards.

The Vermont Supreme Court, in a *per curiam* entry order, affirmed the Superior Court's decision. App. 1a-4a. In so doing, it did not discuss whether the spill was necessary to maintain DO standards, or make a specific ruling on that issue. Thus, without even addressing the DO issue, the court affirmed on the sole ground that aesthetics and recreation were an appropriate basis for the spill condition under Vermont's Water Quality Standards and CWA § 401.[35]

REASONS FOR GRANTING THE PETITION

A. This Court Should Resolve The Important Federal Question Concerning The Scope Of A State's Certification Authority Under § 401 Of The Clean Water Act

As this case was decided by the Vermont Supreme Court, it squarely presents the issue whether § 401 of the Clean Water Act authorizes a state to impose conditions on a FERC license for a hydroelectric project based, not on ascertainable water quality criteria, but on broader state goals such as enhancing scenic aesthetics. The Vermont Supreme Court in this case did not determine whether the DEC's continuous spill condition was necessary to correct an alleged DO deficiency, nor did it

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[34] The $120,000 figure is contained in a letter submitted to the Court after oral argument in response to a question from the bench. The letter was dated May 20, 1992.

[35] The court also stated without explanation that the spill condition would promote "ease of administration and monitoring." App. 3a.

so much as mention DO. It affirmed solely on the basis that the Vermont Water Quality Standards expressly identify recreation and aesthetics as designated uses and values for Class B waters,[36] and that the spill condition is therefore within the scope of the State's regulatory authority under § 401.[37]

If § 401 is as broad as Vermont contends, then a state may impose *any* condition on a FERC licensed project which *in any way* promotes recreation, aesthetics, or other state designated "uses" or "values," simply by incorporating the condition in its water quality certification. Indeed, under Vermont's reading, a state could effectively deny a § 401 certification on the basis of recreational, aesthetic, fish and wildlife, or other concerns that do not involve actual water quality, simply by imposing conditions so onerous as to render continued operation of the project uneconomic.[38]

The FERC has recognized that "[i]t is possible for a state certifying agency to, in effect, veto a project by denying a § 401 certification request and, if challenged, have that decision sustained by state courts."[39] It has also asserted that it does not "believe that a state should

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[36] The decision is inaccurate in its reliance on Class B requirements since the waters below the dam are Class C, which does *not* include "good aesthetic value" among its elements. *See supra* VWQS section 3-04; App. 11a, 20a.

[37] It must therefore be presumed that the Vermont Supreme Court's decision does not rest on an independent alternative state ground based on the DO determinations of the lower state tribunals. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Coleman v. Thompson*, —— U.S. ——, 111 S.Ct. 2546, 2556-58 (1991).

[38] Section 401(d) provides that the limitations and requirements in the state water quality certification "shall become a condition on any Federal license or permit subject to the provisions of this section."

[39] *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172-73 (1990).

be permitted to use its water quality certification authority to impose conditions that are unrelated to water quality and that conflict with the Commission's licensing decisions." [40] Because "review of the appropriateness of water quality certification conditions is the purview of state courts," [41] review by this Court is Simpson's only remedy.

If Vermont and other states are permitted to continue to abuse their § 401 authority, the economic and environmental consequences will be widespread and serious. There are almost 200 hydroelectric projects now in the FERC relicensing process, including at least 12 in Vermont alone,[42] as well as scores of others that must be relicensed in this decade. Unnecessary operating restrictions will reduce power available from these existing projects. States could even force shutdown of projects by denying certification on non-water quality grounds, or imposing onerous conditions without comprehensively balancing such conditions against energy and other environmental considerations. For industrial plants like the Gilman Centennial Mill, this will mean loss of profitability and, in some cases, could result in shutdown for economic reasons. In addition, clean, renewable hydropower lost through misuse of § 401 will have to be replaced by other sources. In New England, and in most other areas of the country, this will likely be commercial power from polluting fossil fuel sources. In addition, new proposed projects may never be built, or their economic and environmental benefits never fully realized, because of the states' use of their § 401 conditioning authority for purposes not directly related to water quality.

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[40] *Id.* at 61,173.

[41] *Id.* at 61,172.

[42] *Special Supplement 1992 Edition*, Hydrowire §§ 7-9, August 1992.

Vermont is not alone. Other states have attempted to use the § 401 certification process to encroach on FERC's licensing jurisdiction. In recent licensing proceedings, the FERC has noted numerous conditions in state water quality certifications which are unrelated to water quality and which pose actual or potential conflicts with the Commission's license, including subjecting project operations to state approval;[43] requiring that a portion of project revenues be deposited in a special account for fish and wildlife enhancement and water quality management;[44] and ordering the project owner to build angler's access paths and low-water stepping stone bridges that raise serious safety concerns.[45]

The several state courts which have considered the scope of § 401 are divided.[46] Courts in Connecticut, Oregon, New York and Pennsylvania have properly interpreted § 401 to preclude imposition of conditions, or outright denial of a certification, on non-water quality related grounds.[47] The Vermont Supreme Court has ruled to the contrary.

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[43] *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

[44] *Carex Hydro*, 52 FERC ¶ 61,216 at 61,768 (1990).

[45] *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990-91 (1992), rehearing granted for further consideration.

[46] The lower federal courts have not addressed state conditioning authority under § 401, because they have consistently held that the CWA requires challenges to 401 certifications to be made in the state courts. E.g., *Roosevelt Campobello Int'l. Park Comm'n. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3rd Cir. 1988).

[47] *Summit Hydropower v. Commissioner of Envtl. Protection*, CV91-050-26-43, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Conn. Sup. July 20, 1992) (minimum spill requirement based on subjective aesthetic impact beyond the scope of state agency's section 401 authority), *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. App. 1986) (denial of certification on

This Court should settle this important federal question. If the issue is not resolved now, other states will join besides Vermont, Maine,[48] and West Virginia[49] in using the CWA § 401 process to encroach on FERC's licensing authority during this critical decade, during which hundreds of the nation's project licenses must be considered for renewal. To postpone resolution of the problem while non-water quality conditions are tested in numerous state courts can only reduce the economic use and environmental benefits of hydroelectric power. A uniform interpretation of § 401 is essential to achieve the water quality purposes of the state certification requirement, without undermining FERC's mandate under the FPA to evaluate and balance all aspects of a project prior to licensing or relicensing.

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the basis of failure to show compliance with state and county land use requirements was error where the certifying agency did not consider whether land use provisions related to water quality), *Pennsylvania Dept. of Envtl. Resources v. City of Harrisburg*, 133 Pa. Commw. 577, 578 A.2d 563 (1990) (state water quality agency exceeded its authority under section 401 by examining the impact of physical changes in the river on aquatic resources resulting from construction of a hydroelectric project and the project's effect on wetlands and fish migration), *In re Power Auth. v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726 (N.Y. 1983) (state certificating agency limited to determining whether hydroelectric project would meet applicable water quality standards, and was not empowered to base its decision on a balancing of need for the project against adverse environmental impacts under state energy law and master plan); *see also deRham v. Diamond*, 343 N.Y.S.2d 84, 295 N.E.2d 763 (N.Y. 1973) (New York's high court interpreting section 401's precessor provision).

[48] *See supra* notes 43-44.

[49] *See supra* note 45.

B. The Plain Language Of The Clean Water Act Makes Clear That Vermont Is Not Authorized To Impose Conditions On A § 401 Water Quality Certification Which Are Unrelated To A Discharge Of Pollutants

The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. As the terms "chemical, physical and biological" imply, that purpose is to be achieved by the abatement and control of scientifically ascertainable pollutants found in facility discharges. *Id.* The Vermont Supreme Court's holding, that a water quality standard need not be related to a scientifically ascertainable discharge of pollutants, is contrary both to this underlying principle and to the plain language of § 401.

That language restricts state conditioning authority under § 401(d) to the imposition of requirements necessary to ensure that the project's discharge complies with objective water quality standards. Under § 401(a)(1) states must certify that facilities which "discharge" into navigable waters are in compliance with CWA §§ 301, 302, 303, 306 and 307. 33 U.S.C. § 1341(a)(1). Each of the referenced sections pertains to the abatement or control of pollution.[50] Moreover, a "discharge," as that term is used in § 401, is defined as "a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). Thus, under the plain meaning of § 401, the requirements in a water quality certification can pertain only to compliance with applicable standards governing a *discharge* of a pollutant or pollutants.

Section 401(d) prescribes specific requirements that limit the conditions a state may include in a certifica-

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[50] Sections 301 and 302 set standards for effluent limitations. Section 303 governs State water quality standards and implementation plans. Section 306 sets national standards of performance for the control of discharges. Finally, § 307 sets effluent pretreatment standards and prohibits the discharge of certain effluents.

tion. The certification must set forth effluent limitations and other limitations and monitoring requirements to assure compliance with pretreatment standards under §§ 301, 302, 306 and 307 of the CWA, "and with any other appropriate requirement of State law set forth in such certification. . . ." The "other appropriate requirement" clause is *not* open-ended, as the Vermont Supreme Court held. Its context requires that it be confined to the abatement or control of the *discharge of pollutants* in accordance with the other sections of the CWA specifically enumerated in §§ 401(a) and (d).

This interpretation is supported by the EPA's regulations governing approval of state water quality standards under section 303, which is specifically enumerated in § 401(a). Management goals such as promotion of aesthetic "values" and recreational "uses" are to be achieved through implementation of specific, quantifiable "criteria." See 40 CFR §§ 131.2, 131.5, 131.6, 131.10, 131.11. These criteria provide objective standards for abating and controlling the discharge of pollutants. The management goals are not themselves enforceable water quality requirements, but rather are expressions of the ends to be promoted by specific water quality criteria.

The goals of aesthetics, fish and wildlife protection, and recreation may appropriately be promoted through specific state water quality criteria for the control of pollutant discharges. This is illustrated by this Court's decision in *Arkansas v. Oklahoma*, —— U.S. ——, 112 S. Ct. 1046 (1992). In that case, the issue was whether a direct discharge permit granted by EPA should be invalidated because the discharge violated the water quality standards, including an aesthetics criterion, of a downstream state. The Court ruled that there was no violation, in part because the EPA had determined that the discharge had not resulted in any *measurable* impacts on the levels of relevant criteria pollutants in the waters of the downstream state. *Id.* at 1059-60.

Significantly, EPA's findings concerning "aesthetics" related solely to the visual quality of the water itself, as affected by a measurable pollutant (phosphorus). *Id.* at 1059 n.16. Thus, for a water quality violation to occur, there must be a pollutant discharge which has an objective, *measurable* effect on the water quality *criteria* which relate to the more general water quality management goal.

The Vermont tribunals in this case made no finding that visual aesthetics of the water itself were affected by pollutants being discharged from the turbines of the Gilman Project. Indeed, at no stage of the case have those tribunals linked aesthetics or recreation to the quality of water in the Connecticut River. The Superior Court advanced aesthetics and recreation as an "independent" justification for the spill requirement, but offered *no* evidentiary basis for this finding related to any of Vermont's objective water quality criteria. The Vermont Supreme Court affirmed the Superior Court, but *only* on the basis of the lower court's finding that "aesthetics" and "recreation" were relevant and sufficient justifications for the spill requirement.[51] The Vermont Supreme Court never alluded to any evidentiary or technical basis in the record to support its conclusion, or to objective criteria relating to aesthetics and recreation. There is nothing in the record of the case to support such a finding. It is evident that the only concern of the

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[51] Since the Vermont Supreme Court did not base its affirmance of the § 401 certification spill requirement on the Superior Court's findings on the DO issue, those findings do not provide an independent alternative ground for the Vermont Supreme Court's affirmance. Nor is it necessary here to discuss whether the purportedly reduced DO levels are actually attributable to the Gilman Project, or whether such an effect (even if it existed) would fall within the meaning of a "discharge of a pollutant or pollutants." 33 U.S.C. § 1362(16). *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (holding that reduction of dissolved oxygen levels caused by a dam is not a discharge of a pollutant or pollutants within the meaning of CWA § 402, 33 U.S.C. § 1342).

Vermont tribunals regarding aesthetics and recreation was for the scenic vista which supposedly would be presented by water spilling over the Project crest gate to recreating tourists.

In basing its conclusion on aesthetics and recreation, the Vermont Supreme Court relied on the "any other appropriate requirement of state law" language of § 401(d). App. 3a. The court apparently was referring to the designated values and uses within Vermont's Water Quality Standards as an "other appropriate requirement of State law." However, those Standards, which were approved by the EPA pursuant to CWA § 303 and the EPA regulations at 40 CFR Part 131, refer to aesthetics only as a management objective or "value" to be pursued, and to recreation only as a designated "use" to be protected. VWQS Section 3-03.[52] The EPA regulations under which Vermont's Standards were approved clearly indicate that such values and uses are goals which can be attained only through implementation of objective, measurable water quality "criteria." *See* 40 CFR §§ 131.2, 131.5, 131.6, 131.10, 131.11.

Vermont's Standards, as required by Vt. Stat. Ann. tit. 10, § 1251a(a) (Supp. 1992), conform to the format imposed by the EPA regulations. The Standards contain objective criteria which (in the case of Class B waters) are presumably related to maintaining appropriate water quality related to aesthetic values and recreational uses. These include measurable factors such as "Turbidity," "Color," and "Taste and Odor." VWQS Section 3-03. Nowhere in the record is there any indication that any of these objective criteria relating to aesthetics or recreation was at issue. There was no suggestion in the Vermont courts, for example, that the spill condition is necessary to maintain the color or reduce

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[52] Class C waters, which include the waters below the Gilman dam, do not include aesthetics and recreation as values or uses. VWQS Section 3-04. *See supra* note 36.

the turbidity of the water, and there is no finding by any tribunal to that effect. *Cf. Arkansas v. Oklahoma, supra.* The only objective criteria invoked by the DEC were the levels of DO present in the reach below the impoundment. The DEC never proved or even claimed that DO levels affect aesthetics or recreation.

Before the Vermont Supreme Court, respondents contended that aesthetics and recreation are expressly included as "values" in Vermont's Water Quality Standards. This led that court to leap to the erroneous conclusion that the aesthetic and recreational aspects of viewing a spill over a dam constitute a "water quality" issue, and therefore an appropriate basis for imposition of a § 401(d) certification condition. The Vermont Supreme Court's holding leaves no effective limitation on state conditioning authority under § 401(d). Without a nexus to water quality in the form of objective measurements of pollutant discharges, subjective aesthetic and recreational values are an improper basis for state certifications, because they are disconnected from the CWA's carefully balanced requirements.

C. Vermont's Expansive Reading Of § 401 Would Subvert the FPA's Comprehensive Federal Licensing Scheme

Vermont's expansive reading of § 401 would allow states to subvert the federal licensing scheme set forth in the FPA. State aesthetic or recreational conditions unrelated to water quality could frustrate FERC's role as the exclusive forum for comprehensive licensing of hydroelectric uses of navigable waterways.

The error of such an approach is magnified when applied to a project like Gilman, which is located on interstate boundary waters. Vermont's spill condition in this case is directly contrary to New Hampshire's § 401 certification that the project is in full compliance with that state's water quality standards. New Hampshire did not

impose a spill requirement even though the Project's dam is located entirely in its waters, the Vermont-required spill would actually take place in New Hampshire, and New Hampshire DO standards were more stringent than Vermont's.

In the FPA, Congress vested exclusive licensing authority in a single federal agency in order to avoid such inconsistencies. Congress expressly preserved this authority in § 102(b)(6) of the CWA, 33 U.S.C. § 1252(b)(6), which for the purpose of water quality control, assigned to the Administrator of the EPA the responsibility for determining the need for storage and low flow augmentation at hydroelectric projects licensed by FERC, but left undisturbed FERC's authority under the FPA to decide whether to include spillage conditions for other purposes.[53] These purposes include energy conservation, navigation, irrigation, flood control, water supply, fish and wildlife protection, recreational opportunities and other aspects of environmental quality. *See supra* pp. 4-6.

Vermont's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the FPA

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[53] Section 102(b)(6) provides:

> No license granted by the Federal Energy Regultaory Commission for a hydroelectric power project shall include storage for regulation of streamflow *for the purpose of water quality control* unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan. [Emphasis added].

Section 102(b)(2) contains a similar allocation of authority for Federal water reservoirs. It provides that "the need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, aesthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies." *See* S. Rep. No. 1236, 92nd Cong., 2d Sess. 101 (1972).

by implication. Repeals by implication are disfavored. To the maximum extent possible, courts must read related statutes together in order to give effect to each; only when the sense and purpose of each cannot be preserved by such a reading is implied repeal recognized. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (*citing Morton v. Mancari*, 417 U.S. 525, 549 (1974)). The limited authority given to the states by the CWA to prescribe water quality standards and, through the § 401 process, to certify compliance with those standards, was not intended to defeat the comprehensive planning authority vested in FERC by the FPA.

The Court has made it abundantly clear that in Part I of the FPA Congress vested in FERC (and its predecessor agencies) exclusive authority comprehensively to evaluate and balance the multi-faceted aspects of the public interest affected by hydroelectric projects. Over 40 years ago the Court in *First Iowa* rejected a state's attempt to impose a broad state permitting requirement on a hydroelectric project under the jurisdiction of the FPC. The Court stated that requiring the applicant to secure a state permit would "vest in [state authorities] a veto power over the federal project" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" with which the FPC was charged. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946). The validity of the *First Iowa* holding has been reaffirmed by the Court on numerous occasions.[54]

This Court recently rejected an attempt by a state to undermine FERC's primary role by applying an expansive reading of FPA section 27, which reserves certain

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[54] *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958); *FPC v. Oregon*, 349 U.S. 435, 444-45 (1955).

authority to the states regarding proprietary water rights. *California v. FERC*, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990). The Court pointed out that Congress, in its 1986 amendments to the FPA,[55] had the opportunity to alter FERC's role *vis a vis* the states, but chose instead "to elaborate and reaffirm *First Iowa*'s understanding that the FPA establishes a broad and paramount federal regulatory role." 495 U.S. at 499.

In 1986, Congress added subsection (j) to FPA § 10, 16 U.S.C. § 803(j). It requires FERC to implement state fish and wildlife recommendations unless it finds sufficient grounds for rejecting them. Congress would not have added this provision if it believed that the states already had the authority to impose mandatory fish and wildlife conditions in a § 401 certification. Moreover, the reaffirmation of FERC's primary role would have made no sense if Congress had already transferred it to the states in § 401 of the CWA.[56]

Through § 10(j) and through FERC's pre-filing consultation process, 18 CFR §§ 4.38, 16.8, the states can make recommendations to FERC relating to recreation, aesthetics, fish and wildlife, and other aspects of a project. However, a state may not impose mandatory conditions, or veto the construction or continued operation of a project, based on such matters. That is FERC's role. The limited authority granted to state water quality agencies by § 401 should not be interpreted so as to permit states to subvert both the FPA and the CWA by including certification conditions unrelated to water quality.

The FERC has a statutory mandate to balance carefully various power and non-power values, including

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[55] Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986).

[56] Section 401 is part of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, approved October 11, 1972, 86 Stat. 816 (1972).

aesthetics and recreational concerns. The states typically have no equivalent obligation. The present case is a clear example of the consequences of allowing a state water quality agency, with a relatively narrow focus and agenda, to usurp FERC's comprehensive planning role by imposing an unreasonable and burdensome § 401 condition which FERC and the federal courts are powerless to revise. The Vermont DEC would impose a costly spill condition on an existing project dam, which is located in another state that imposed no such requirement. Moreover, the DEC engaged in no apparent analysis of the economic or broader environmental impacts of the spill requirement. Congress could hardly have intended such a result in enacting § 401.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 1992

APPENDICES

APPENDICES

APPENDIX A

VERMONT SUPREME COURT

Supreme Court Docket No. 91-530

MAY TERM, 1992

GEORGIA-PACIFIC CORPORATION and SIMPSON PAPER (VERMONT) CO., INC.

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB

Appealed From: Washington Superior Court
Docket No. S473-89 WnCa

ENTRY ORDER

In the above entitled cause the Clerk will enter:

Plaintiffs appeal a Washington Superior Court judgment affirming a decision of the Vermont Department of Environmental Conservation (DEC). They seek to set aside continuous spillage conditions in a § 401 water quality certification, or, alternatively, seek a remand to the DEC for consideration of additional evidence, or a remand to superior court for de novo review. We affirm.

Plaintiffs' contention that the court's denial of their request to remand to the DEC for additional evidence and

reconsideration was an abuse of discretion is without merit. A remand to an administrative agency is meant only as a "safety valve" to be used if justice so requires. *In re Maple Tree Place*, 156 Vt. 494, 499 (1991) (quoting *State ex rel. Gunstone v. Washington State Highway Commission*, 72 Wash. 2d 673, 674, 434 P.2d 734, 735 (1967)). The court found that plaintiffs had the opportunity, which they did not take, to present evidence of their management proposal to the DEC. Further, the court found that the additional proceedings would be a waste of time and expense and would most likely not change the result. These findings are not clearly erroneous and amply support the court's discretionary ruling.

Plaintiffs argue they were entitled to a de novo hearing on the merits in superior court. Plaintiffs, however, waived any opportunity for a de novo hearing with the court, as illustrated by the following exchange at a pending motions hearing:

> The Court: . . . It is your position that this is not a de novo hearing?
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> Mr. Pearson: My position today is—and if my feet were held to the fire, I don't think it is—but I think on the other hand, an argument could be made that the Rule 75 does not preclude a de novo hearing. It leaves it to other applicable law to decide what the hearing is. I think if we really want to work at it, we could make an argument that in this context a de novo hearing would be appropriate. I've yet to convince Washington counsel and my client one way or the other on that issue. My personal feeling is I think it probably is not a de novo hearing, although, as I say, I think an argument could be made, and I just haven't convinced them to forget about that little argument we could make and get on with the business of just having this heard on the administrative record.
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> . . . .

> The Court: [I]t would appear that the only issue is whether the plaintiff has almost agreed that it's not going to be a de novo hearing. The State agrees that it's not going to be a de novo hearing? Yes.
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> . . . .
>
> The Court: Do you [Sierra Club]—is it your position that this is a de novo hearing or is this not?
>
> Mr. Smith: It's the Club's position that this is a review of the administrative record.
>
> The Court: Right. I think maybe we have an agreement.

At no further time was there consideration of whether review would be de novo. The court was never asked to rule, nor did it rule, on the de novo issue raised here.

Plaintiffs also argue for the first time on appeal that denial of a remand to the DEC violated their constitutional rights. These challenges are likewise waived. *In re Quechee Lakes Corp.*, 154 Vt. 543, 552, 580 A.2d 957, 962 (1990).

Plaintiffs lastly contend that the spillage requirement was not supported by the evidence and that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement. The Clean Water Act allows the state to impose conditions in a § 401 certification to ensure applicant's compliance with certain criteria, including "any other appropriate requirement of State law." 33 U.S.C. § 1341 (d). Vermont's water quality standards promulgated in accordance with this Act require that the Connecticut River be managed for "water of a quality which consistently exhibits good aesthetic value . . . and recreation." Vermont Water Quality Standards § 3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement. See *In re Sherburne*,

154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (added deference afforded agency determinations in highly technical fields).

Affirmed.

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

/s/ John A. Dooley
JOHN A. DOOLEY
Associate Justice

/s/ James L. Morse
JAMES L. MORSE
Associate Justice

/s/ Denise R. JOHNSON
DENISE R. JOHNSON
Associate Justice

APPENDIX B

STATE OF VERMONT
WASHINGTON COUNTY, ss.

VERMONT SUPERIOR COURT

Docket No. S473-89 WnCa

GEORGIA-PACIFIC CORPORATION and SIMPSON PAPER (VERMONT) INC.,
Plaintiffs,

vs.

VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION and THE SIERRA CLUB,
Defendants.

OPINION AND ORDER

Plaintiffs Georgia-Pacific Corporation (hereinafter "G-P") and Simpson Paper (Vermont), Inc. (hereinafter "Simpson") ask the court to revise or remand the § 401 Water Quality Certification issued by the Vermont Department of Environmental Conservation (hereinafter "DEC") back to the DEC for further consideration. Defendants DEC and Sierra Club oppose the appeal. In response, and in consideration of the extensive administrative records before the court, the court makes the following findings, conclusions, and order:

1. The Gilman Project, an existing hydroelectric station on the Connecticut River, has entered the Federal Energy Regulation Commission relicensing process. The present license expires December 31, 1990.

2. The project is owned by Simpson, and the license is held by G-P. The dam was constructed about 1900 and is a low timber crib and concrete structure.

3. The powerhouse is integral with the dam and is located on the west side of the river, partly in Vermont and partly in New Hampshire. It contains four units with a total plant capacity of 4850 kw.

4. The dam, which is about 319 feet long with a maximum height of 38 feet, is 21 miles below the breached Northumberland Dam and 11 miles above the Moore Reservoir Dam. Five feet of flashboards on Gilman Dam bring the normal pond to elevation 833.3′ NGVD. The approximate tailwater elevation is 809.0′ NGVD, which corresponds to the Moore Reservoir full pool elevation. Gilman Dam creates an impoundment that extends 2.9 miles upstream to a point just above the Johns River. The surface area and gross volume are 130 acres and 705 acre-feet, respectively.

5. The project is described as run-of-river with a usable net storage capacity that is considered to be negligible. Outflow equals inflow on an instantaneous basis. The hydraulic capabilities of the four turbines are 1250 cfs, 600 cfs, 500 cfs, and 500 cfs, for a total of 2850 cfs. The total capacity is close to the mean river flow of 2915 cfs. The 1250 unit was installed as a replacement for an older unit in 1985-86. It is automatically operated while the other units are manual. A crest gate installed in 1979 is used to help maintain the pond level at the top of the boards at inflows up to project capacity and to reduce the incidence of flashboard failure, which occurs at surcharges in excess of 1.5 feet. The powerhouse can generate down to 130 cfs without cycling.

6. The average operating level of Moore Reservoir during the months of July and August is 805.2′ NGVD. At this level, the reservoir extends to Cushman Brook, which is on the New Hampshire side about one mile below Gilman Dam.

7. On April 22, 1985, the DEC issued to G-P a § 401 certification in connection with the aforementioned 1985-86 replacement of one of the four turbine/generator units at the Gilman hydroelectric project. In that 1985 certification, the DEC stated in part that "due to pollutant loading and reduced reaeration caused by impounded waters and diversion of flow at dams, there is a critical dissolved oxygen problem in the Connecticut River . . . the Department will investigate opportunities to increase aeration at this site during the relicensing process."

8. In 1983 Metcalf & Eddy, Inc, modeled water quality conditions in the Connecticut River from the Upper Amonoosuc River to the Gilman Dam for the federal E.P.A. The 1983 study indicated that substandard DO conditions would prevail for a substantial portion of the study reach under critical low flows and design wastewater discharges.

9. In 1985, G-P contracted with Aquatec, Inc, to perform an intensive 48 hour DO sampling program that included stations from just upstream on the Johns River to a point about 1½ mile downstream of the dam, within the summer operating pool of the Moore Reservoir. The study was conducted August 12-14, 1985. Flows were estimated at 800 cfs, or about twice the 7Q10 of 373 cfs. An effort was made to quantify the potential benefits of reaeration at the dam. During the first half of the study, downstream samples were collected with no water being spilled at the dam. During the last 24 hours, 100 cfs was released over the crest gate discharging at 833.3′ NGVD above the sill elevation of 812.1′ NGVD.

10. The Aquatec program concluded that all samples collected on the main stem were above 6 mg/l dissolved oxygen. The Johns River exhibited lower dissolved oxygen levels down to 5.2 mg/l. Releases over the crest gate gained from this point source of reaeration from 0.4 mg/l to 0.8 mg/l of dissolved oxygen over the levels measured in the tailrace discharge. DO levels also gen-

erally increased in the free-flowing river reach between the two sampling stations furthest down the study reach below the dam.

The sampling period 800 cfs does not represent conditions under which violations of DO standards would be expected.

11. In 1985, Metcalf & Eddy were hired by plaintiff to provide a model for reaeration of flows over Gilman Dam and the upstream DO conditions with the new discharge permit limits for the Groveton paper mill. Conditions were modeled at 800 cfs and 7Q10, with and without a spillage of 100 cfs. At 7Q10, upstream DO levels reached 5.2 mg/l (3.6 mg/l deficit from saturation at 22.5 C) at the dam and at 800 cfs, 6.05 mg/l. Spillage of 100 cfs mixed with the unaerated turbine discharge produced a mixed dissolved oxygen level directly below the dam of 6.3 mg/l at 7Q10 and 6.9 mg/l at 800 cfs.

No attempt was made to determine the mixed DO concentration necessary at different river discharges in order to assure that the downstream dissolved oxygen sag remains above standards. Without adequate spillage and consequent elevated DO levels, the study concluded that substandard conditions would occur in the downstream reach to Moore Reservoir. For example, at 7Q10 flows and the project operating without spillage, the substandard condition on the upstream side of the dam (5.2 mg/l) would be released through the turbine, additional wasteload would be added at Gilman, and DO levels would continue to decline.

12. Metcalf & Eddy's 1985 report states:

> Modeling results indicated probable water quality standard violations under critical low flow conditions for a substantial portion of the study area . . . the large DO [dissolved oxygen] sag from river mile

> 324 to 312 is caused by BOD [biochemical oxygen demand] exertion from the James River discharge and by sediment oxygen demand through this region.

Metcalf and Eddy, *Georgia-Pacific Modeling Study* (1985), at p. 2-4.

13. Simultaneous with the § 401 certification process for the hydroelectric project, G-P was seeking renewal of its "Direct Discharge Permit," which allowed for discharge of the paper mill's treated wastewater from the papermaking process itself. This Discharge Permit was granted by DEC on March 15, 1989, and is effective until September 30, 1993. A particular requirement of that permit provides the limits for discharge of BOD(5) (five day biochemical oxygen demand) at 1,650 pounds maximum per day and 1,100 pounds maximum on an average monthly basis. These are the same BOD(5) discharge limits which had been in effect for the G-P paper mill in the previous permit, since 1981.

14. The James River Corporation paper plant in Groveton, New Hampshire on the Upper Amonoosuc River, which empties into the Connecticut River upstream of the Gilman project, has always been known and acknowledged by DEC to be the largest single case of dissolved oxygen deficiencies in the upper Connecticut River. G-P argues that three years after G-P and DEC had begun informal discussions about the § 401 certification, and more than ten months after G-P's formal application, DEC was mistaken about where the paper mill's direct discharge enters the Connecticut River. Whereas the discharge enters some "750 feet upstream from the Gilman Dam," DEC's only modeling run assumed that the discharge entered the river downstream from the dam. However, the DEC agreed not to hold plaintiffs responsible for substandard water quality conditions caused by upstream discharges, assuming in the case at bar the DO standard had been met upstream of the plaintiff's dam.

Therefore, any mistakes concerning the location of the discharge from the James River plant does not change the resuults in the case at bar.

15. The Gilman hydroelectric project's capability to operate at a broad range of flows from mean flow down to 130 cfs, which is below the 7Q10 value of 373 cfs, does not provide for reaeration over the dam at these flows. The DO deficit reduction caused by spillage reaeration is important in this water quality limited segment. Run-of-river operation does not in and of itself assure DO standards will be met.

16. DEC independently conducted one complete run of its own "DOSIM" computer model analysis of predicted water quality impacts caused by the Gilman Dam project. The DEC's computer run reflected known conditions of the rivers. The "DOSIM" model, as applied in this case, is identical to the "Qual-II" computer models used and recognized by the Federal E.P.A. The plaintiff's "Qual-II" model results concurred with the relevant portions of the "DOSIM" analysis.

17. An additional computer modeling analysis was done in June of 1989 by Kleinschmidt Associates, G-P and Simpson's engineering consultant. This analysis utilized 33 different sets of input parameters. Despite its own computer data, DEC adopted plaintiff's "Run E" to accommodate plaintiffs. The DEC also took into account the revised and refined application of the "DOSIM" model and the results of the plaintiffs' water quality certificate. The DEC also factored in daily fluctuations of DO.

18. The final and revised "DOSIM" model runs performed by Kleinschmidt Associates showed that (a) under possible 7Q10 (i.e. 370 cfs) river flow conditions, (b) at summertime river temperatures of 22 degrees centigrade (71.6 degrees Fahrenheit), and (c) with all upstream point source discharges, including the G-P/

Simpson mill as well as the James River paper plant, at maximum permitted levels, downstream of the Gilman Dam there could be a "sag" or temporary decline in DO levels from 6.3 mg/l to 6.1 mg/l before recovering to 6.4 mg/l at distances below the dam of 1.5 to 2.4 to 3.5 miles respectively.

19. The decrease or "sag" in DO levels downstream of the Gilman Dam under the refined "DOSIM" analysis would be 0.4 mg/l of DO before recovery. G-P concedes that under these adverse conditions there is a DO deficit of 0.4 mg/l.

20. The seven day average high summer water temperature in the Connecticut River at the project site which has been assumed for all final water quality computer analyses run in June 1989 is 22 degrees centigrade, or 71.5 degrees Fahrenheit. The modeling on which the water quality certificate is based assumed a river temperature of 22 degrees centigrade. Daily temperature readings in the river taken between January 1979 and April of 1989 (except June 1984 to August 10, 1985) reveal seven day river temperatures in excess of 21.1 degrees centigrade, or 70 degrees Fahrenheit, occur for approximately a four week period, from July 10 to August 6 of each year. Seven day average river temperature exceeded 65 degrees Fahrenheit for approximately a seven week priod, from July 7 to August 27 of each year. The required DO standard is inversely proportional to temperature; as the temperature increases the DO standard decreases.

21. The Connecticut River is categorized as Class B waters from Groveton to Gilman Dam and Class C from Gilman to the Lunenburg town line. The river is designated a cold water fish habitat. The Vermont water quality standards require that DO levels in a cold water fish habitat be not less than 6.2 mg/l, or 70% saturation (75% for New Hampshire) at 22 degrees centigrade at all times, unless a higher standard is determined to be

necessary for reaches critical to spawning or nursery. The standards require that applicable water quality criteria apply at the agreed minimum flow, or 7Q10, whichever is less.

22. Diurnal fluctuation—i.e. differences between daytime and nighttime DO levels due to photosynthesis and respiration effects of algae in the river—occur both upstream and downstream of the Gilman Dam, in the Gilman impoundment, and in Moore Reservoir. The downstream diurnal fluctuation was 1.6 mg/l. A total flux of 1.6 mg/l causes DO to rise 0.8 mg/l above background conditions. As such, natural river conditions will cause a DO deficit of at least 0.8 mg/l beyond the 0.4 mg/l deficits caused by the dam's normal operations, resulting in a cumulative summer DO deficit of 1.2 mg/l.

23. Based on the DO deficits caused by the Gilman Dam and diurnal fluctuation, the DEC imposed conditions on the § 401 permit awarded to G-P, requiring a spillage of at least 210 cfs between June 1 and October 15 of each year to compensate for the DO deficit. This would increase DO to 7.4 mg/l directly below the dam and would increase the DO at the downstream "sag point" to the state minimum of 6.2 mg/l.

24. In addition to alleviating the DO deficit, spillage of 210 cfs between June 1 and October 15 will serve to prevent aquatic habitat degration and will protect downstream water quality for a number of species of fish, including the Atlantic salmon. The spillage requirement will also serve to restore to a degree the aesthetics of the river downstream of the dam during the time of year when public use of the river is at its peak.

25. DEC completed its modeling in November 1988 and notified plaintiffs in December 1988 that, based on the modeling, spillage would be required. The modeling accounted for diurnal flux. At plaintiffs' request, discussions

began on June 13, 1989 and continued until the issuance of the water quality certificate.

Conclusions of Law

A. "On appeal, an agency's conclusions of law will be upheld if they are fairly and reasonably supported by the findings of fact." *In re Orzel*, 145 Vt. 355, 359 (1985), citing *In re McGrath*, 138 Vt. 77, 82 (1980).

B. In determining whether the DEC acted unreasonably or arbitrarily in requiring a continuous spill requirement for the specified period, the court ". . . must decide whether the decision makes sense to a reasonable person—even if the reviewing court might have weighed the factors differently." *In re Town of Shelburne*, 154 Vt. 596, 605 (1990), citing *State Dept. of Taxes v. Tri-State Industrial Laundries, Inc.*, 138 Vt. 292, 294 (1980). However, an agency has the obligation to ". . . explain its reasons for finding as it [did]; if it does not give reasons, its decision may appear arbitrary." *In re Town of Shelburne*, 154 Vt. at 605 (citations omitted).

C. In reviewing the decisions of administrative agencies, our Supreme Court has served notice that it is ". . . an appellate court, not a fact finding agency; we must defer to the [agency] when its findings are supported—even when the record contains contradictory evidence—and when its conclusions are rationally derived from its findings and based on a correct interpretation of the law." *Id.* at 607, citing to *In re Southview Associates*, 153 Vt. 171, 177-178 (1989). "Where an administrative agency is deciding a highly technical matter, a reviewing court will defer more readily than where the issues in controversy are accessible to a generalist judge." *Shelburne* at 607.

D. The DEC has a mandate to protect the environmental health of the Connecticut River in order to

preserve it as a habitat for aquatic species and its aesthetic value for recreational use. It is plaintiffs' burden to demonstrate to the DEC that the Gilman Dam will not violate water quality standards; it will not suffice for plaintiffs to show that the dam might not adversely impact the river environment.

E. G-P does not contest that under certain conditions that the normal operation of the dam may cause a DO deficit of 0.4 mg/l in the Connecticut River south of the Gilman Dam project. The conclusions of the DEC's computer modeling runs as well as the conclusions of plaintiffs' own experts, Metcalf & Eddy and Kleinschmidt Associates, support this finding. The court has no reason to doubt the consensus of scientific opinion on this fact.

F. Similarly, the court has been presented with no reason to doubt the DEC's conclusion that diurnal fluctuation may cause an additional DO deficit of 0.8 mg/l. In light of its factual determination that the DO "sag" caused by the dam and diurnal fluctuation could cause a DO deficit directly below the dam or 1.2 mg/l, the DEC ruled that a continuous flow of 210 cfs from June 1 to October 15 was necessary to counteract the DO deficit. This is precisely the type of "highly technical matter" to which the *Shelburne* Court recommended a high level of deference to agency expertise, and the court will not presume to substitute its judgment for that of the agency.

G. In addition to the express finding that a continuous flow of 210 cfs is required to restore and improve the Connecticut River as a fish habitat, the DEC also concluded that the specified continuous flow was required to safeguard the aesthetic appeal of the river to the numerous persons who use the river for recreation during the specified time period. The aesthetic determination forms a strong independent basis upon which to uphold the 210 cfs continuous spill requirement during the specified time period.

H. The court finds substantial evidence in the record to support the DEC determination that a continuous flow of 210 cfs over the Gilman Dam during the specified time period is necessary to protect and improve the Connecticut River as a resource.

I. Plaintiffs seek a remand of the case to the DEC, asserting that they should receive the opportunity to present to DEC an alternative method of assuring sufficient DO downstream, specifically by continuous monitoring of downstream DO conditions during the specified time period and spillage of additional water when there is a measurable downstream DO deficit. Remand requests such as that sought by plaintiffs is governed by the recent Vermont Supreme Court case of *In re Maple Tree Place.* —— Vt.L.W. ——. No. 90-354 (May 17, 1991).

Maple Tree Place stands for the proposition that trial courts have the inherent power to order a remand to an administrative agency where the interests of justice so require. Slip op. at pp. 5, 10. Our Supreme Court cited with approval what the Court characterized as a "common sense approach to remand" as set forth by the Washington State Supreme Court in *State ex rel Gunstone v. Washington State Highway Commission*, 434 P.2d. 734, 735 (1967). *Maple Tree Place*, slip op. at p. 6. A remand is to be used as a "safety valve," to be used where the agency ". . . may have acted upon incomplete or inadequate information: or may have failed to give adequate consideration to an alternative route . . ." *Id.*

J. The court finds that the record before the DEC is bare of any formal presentation by plaintiffs of their proposed management plan despite knowledge as early as 1983 that DO deficits existed downstream of the dam. *See* Findings of Fact 8 and 12 (the 1983 and 1985 Metcalf & Eddy studies); *see also* Finding of Fact 7 (the DEC informed plaintiffs in conjunction with the 1985 replacement of a turbine that DO levels would be an issue

during the relicensing process). The record is clear that it was not until after plaintiffs realized that the DEC was serious about imposing a continuous spill requirement that plaintiffs agreed that their management plan would accomplish the same goals as the continuous spill requirement.

Plaintiffs were never prevented from proposing their plan during the pendency of the application; the interest of justice therefore do not require a remand solely to afford plaintiffs a second opportunity to fulfill their obligation to provide an adequate record. *Cf. Goshey v. Morey*, 149 Vt. 93, 97 (1987); *Estate of Emilio St. Pierre*, 146 Vt. 421, 424 (1985) (construing analogous V.R.C.P. 60(b)(6) for the proposition that the interests of justice do not require relief from judgment where a party has made a deliberate litigation choice); *compare Maple Tree Place*, slip op. at 2 (plaintiffs asserted that they were misled into not presenting a plan for phased development by the actions of the agency; no such misleading during the pendency of the application is asserted by plaintiffs in the case at bar). The court rules that *Maple Tree Place* does not support a remand for additional consideration of a plan which was not submitted to the DEC until after the application process was closed and the continuous flow requirement set in place.

K. Moreover, the court finds that remand would serve no useful purpose because the management plan as proposed by plaintiffs has already been found flawed by an agency with considerable expertise in the area of hydropower management, the Federal Energy Regulatory Commission ("FERC"). In a formal *Environmental Assessment for Hydropower Licence*, Gilman Hydroelectric Project, dated April 4, 1990, FERC approved of the continuous spill requirement and rejected plaintiffs' proposal, stating:

> The [210 cfs spill flow] proposed by the VANR uses spill flow at the dam, an easily gaged and monitored parameter, to meet specific future DO goals downstream of the project. *The applicant's proposed water quality management plan, which depends on an unproven predictive water quality model, would be difficult to monitor and enforce for compliance with the goal of maintaining DO at the sag point.*

Id. at p. 18 (emphasis added). The court sees no reason to doubt FERC's expertise in this area, finds its conclusions to be supportable, and accepts as fact FERC's negative scientific assessment of plaintiffs' proposal. *See Shelburne*, 154 Vt. at 605, 607.

L. Additionally, in informal discussions between the DEC and plaintiffs which have occurred since the continuous spill requirement was placed on plaintiffs' permit, the DEC has also disapproved of the management proposal as being unworkable in light of present day technology and violative of the water quality standards. Remand to DEC would therefore more than likely cause unnecessary expense and delay and would result in the issuance of a permit with the same conditions as are attached to the current permit.

M. Finally, there is no reason to believe that plaintiffs' management plan would serve the aesthetic and recreational goals which will be enhanced by the June 1 to October 15 continuous flow requirement.

CONCLUSION AND ORDER

The decision of the DEC requiring flow of 210 cfs over the Gilman Dam between June 1 and October 15 is supported by substantial evidence and is *AFFIRMED.* A *Maple Tree Place* remand is inappropriate because plaintiffs had full opportunity to present their alternative management proposal to the DEC prior to the issuance of the conditional permit and failed to do so. Moreover,

plaintiff's management proposal has already been formally rejected by FERC and informally rejected by DEC as insufficient to protect the Connecticut River in light of current technology. Plaintiffs' request for remand is *DENIED.*

Dated at Chelsea, Vermont, this 2nd day of Oct. 1991.

/s/ Alan W. Cheever
HON. ALAN W. CHEEVER
Superior Court Judge

APPENDIX C

WATER QUALITY CERTIFICATION
(P.L. 92-500)

IN THE MATTER OF: GEORGIA-PACIFIC CORPORATION
GILMAN, VERMONT 05904

Application for the Gilman Project

The Water Quality Division of the Vermont Department of Environmental Conservation (the Department) has reviewed the water quality certification application filed for Georgia-Pacific Corporation (the applicant) by letter dated August 2, 1988. The Department finds:

1. The Gilman Project, an existing hydroelectric station on the Connecticut River, has entered the Federal Energy Regulatory Commission relicensing process. The present license expires December 31, 1990.

2. The project is located at the Georgia-Pacific Corporation Whitefield Division paper plant at Gilman village in the Town of Lunenburg. The dam was constructed about 1900 and is a low timber crib and concrete structure.

3. The powerhouse is integral with the dam and located on the west side of the river, partly in Vermont and partly in New Hampshire. It contains four units with a total plant capacity of 4850 kw.

4. The dam, which is about 319 feet long with a maximum height of 38 feet, is 21 miles below the breached Northumberland Dam and 11 miles above the Moore Reservoir Dam. Five feet of flashboards

on Gilman Dam bring the normal pond to elevation 833.3′ NGVD. The approximate tailwater elevation is 809.0′ NGVD, which corresponds to the Moore Reservoir full pool elevation. Gilman Dam creates an impoundment that extends 2.9 miles upstream to a point just above the Johns River. The surface area and gross volume are 130 acres and 705 acre-feet, respectively.

5. The project is described as run-of-river with a "usable (net) storage capacity [that] is considered to be negligible" (page A-10 of the FERC application, which was filed as supporting documentation for the certification request). "Outflow [equals] inflow on an instantaneous basis" (page A-2 of the FERC application). The hydraulic capacities of the four turbines are 1250 cfs, 600 cfs, 500 cfs and 500 cfs, for a total of 2850 cfs. The total capacity is close to the mean river flow of 2915 cfs. The 1250 cfs unit was installed as a replacement for an older unit in 1985-1986. It is automatically operated while the other units are manual. A crest gate installed in 1979 is used to help maintain the pond level at the top of the boards at inflows up to project capacity and to reduce the incidence of flashboard failure, which occurs at surcharges in excess of 1.5 feet. The powerhouse can generate down to 130 cfs without cycling.

6. The average operating level of Moore Reservoir during the months of July and August is 805.2′ NGVD. At this level, the reservoir extends to Cushman Brook, which is on the new Hampshire side about one mile below Gilman Dam.

7. The Connecticut River is Class B waters from Groveton to Gilman Dam and Class C from Gilman to the Lunenburg town line. A critical dissolved oxygen problem occasionally exists in the river at

certain times of the year as a result of pollutant loading and reduced reaeration potential caused by impounded waters and reduced spillage at dams due to hydroelectric operation. The project is in a water quality limited segment.

The river is designated as a cold water fish habitat, which sets the dissolved oxygen standard at a minimum of 6 mg/l or 70% saturation (75% for New Hampshire) unless a higher standard is determined to be necessary for reaches critical for spawning or nursery. Section 1-03 of the Vermont Water Quality Standards imposes a higher level of protection by outlining the public good criteria to be met in cases where a project may degrade water quality where existing water quality generally exceeds minimum standards.

8. In the project area, the river receives treated wastewater discharges from the municipalities of Groveton, Lancaster, Northumberland and Lunenburg and from the paper mills at Gilman and Groveton (James River Paper Company). According to the application, untreated sanitary wastes enters the Johns River at the Village of Whitefield, N.H.

9. Metcalf & Eddy, Inc. modeled water quality conditions in the Connecticut from the Upper Ammonoosuc to Gilman in 1983 for E.P.A. The model indicated that substandard conditions would prevail for a substantial portion of the study reach under critical low flows and design wastewater discharges.

10. The applicant contracted with Aquatec, Inc. to perform an intensive 48-hour dissolved oxygen sampling program that included stations from just upstream of the Johns River to a point about 1½ mile downstream of the dam (within the summer

operating pool of Moore Reservoir). The study was conducted August 12-14, 1985. Flows were estimated at 800 cfs, or about twice the 7Q10 of 373 cfs. An effort was made to quantify the potential benefits of reaeration at the dam. During the first half of the study, downstream samples were collected with no water being spilled at the dam. During the last 24 hours, 100 cfs was released over the crest gate discharging at 833.3′ NGVD above the sill elevation of 812.1′ NGVD.

All samples collected on the main stem were above 6 mg/l dissolved oxygen. The Johns River exhibited lower dissolved oxygen levels down to 5.2 mg/l. Releases over the crest gate gained from this point source of reaeration from 0.4 mg/l to 0.8 mg/l of dissolved oxygen over the levels measured in the tailrace discharge. Dissolved oxygen levels also generally increased in the free-flowing river reach between the two sampling stations furthest down the study reach below the dam.

The sampling period 800 cfs does not represent conditions under which violations of dissolved oxygen standards would be expected.

11. Under a contract with the applicant, Metcalf & Eddy, Inc. modeled reaeration of flows over Gilman Dam and the upstream dissolved oxygen conditions with the new discharge permit limits for the Groveton paper mill. Conidtions were modeled at 800 cfs and 7Q10, with and without a spillage of 100 cfs. At 7Q10, upstream dissolved oxygen levels reached 5.2 mg/l (3.6 mg/l deficit from saturation at 22.5 C) at the dam and at 800 cfs, 6.05 mg/l. Spillage of 100 cfs mixed with the unaerated turbine discharge produced a mixed dissolved oxygen directly below the dam of 6.3 mg/l at 7Q10 and 6.9 mg/l at 800 cfs.

No attempt was made to determine the mixed dissolved oxygen concentrations necessary at different river discharges in order to assure that the downstream dissolved oxygen sag remains above standards. Without adequate spillage and consequent elevated dissolved oxygen levels, substandard conditions would occur in the downstream reach to Moore Reservior. For example, at 7Q10 flows and the project operating without spillage, the substandard condition on the upstream side of the dam (5.2 mg/l) would be released through the turbine, additional wasteload would be added at Gilman, and the dissolved oxygen levels would continue to decline.

12. The applicant's FERC application indicates no changes to their present mode of operation; however, the applicant has proposed to spill 130 cfs under circumstances during the period July 15-September 15 where inflow is below 500 cfs and measured dissolved oxygen levels downstream fall below 6.2 mg/l.

13. The project's capability to operate at a broad range of flows from mean flow down to 130 cfs, which is below the 7Q10 value of 373 cfs, does not provide for reaeration over the dam at these flows. The dissolved oxygen deficit reduction caused by spillage reaeration is important in this water quality limited segment. Run-of-river operation does not in and of itself assure standards will be met.

14. During June, 1989 and in cooperation with Kleinschmidt Associates, the applicant's engineering consultant, the Department performed a screening model analysis of the reach from Gilman Dam to Moore Reservoir to estimate the spillage necessary to assure maintenance of dissolved oxygen above Vermont's minimum standards. At 7Q10 flows

of 373 cfs, 210 cfs must be spilled to create a mixed dissolved oxygen level of 7.4 mg/l directly below the dam (6.2 mg/l assumed upstream of dam). The resulting dissolved oxygen sag curve downstream would decline to 6.2 mg/l (70% saturation at 22 C), including the effect of the discharge of Georgia-Pacific's permitted waste load of 3150 lb./day UOD combined with a dissolved oxygen flux caused by algal respiration and photosynthesis.

The model indicates that dissolved oxygen levels would drop below minimum standards to less than 60% saturation at the sag under a no-spill operating condition, assuming 7Q10 flows and waste discharges at design. The project can operate down to 130 cfs; dissolved oxygen levels during periods of flow less than 7Q10 would be even more severely depressed. Under flow conditions higher than 7Q10, the increase in dilution of pollutant loadings combined with a spillage of 210 cfs will assure that standards are met downstream.

15. Vermont manages the Connecticut River as a cold water fish habitat. Resident species include rainbow, brook and brown trout as well as several warm water species including smallmouth bass, perch, bullhead, and pickerel. Vermont is also participating in a cooperative program with several other states and federal agencies to restore Atlantic salmon and shad to the Connecticut River Basin.

Present plans include construction of trap facilities at Ryegate Dam and transporting salmon upstream for access to spawning habitat. Between Gilman Dam and Canaan Dam, approximately 9% of the nursery habitat for the Connecticut is believed to exist. The applicant would be expected

to participate in the cost of effecting the final upstream passage plan.

Safe downstream passage of the salmon is also critical to the success of the program. Reduction of both turbine and trashrack impingement mortality and provision of conveyance flows over or through the dam are important elements of downstream passage plans. An alternative of using trap-and-truck facilities to accommodate downstream passage is also being considered.

The applicant has developed conceptual designs for downstream passage facilities with the U.S. Fish & Wildlife Service. The plan consists of an angled intake guidance system, a bell-mouthed intake and a bypass conduit. A flow of 30 cfs would be used to operate the system. The applicant proposes in the license application to institute these measures when warranted by planned stocking of salmon upstream of Gilman. No use of the Upper Connecticut River is being made at this time. It should be noted that hatchery produced salmon may be placed upstream of Gilman Dam to use the available spawning and nursery habitat *before* upstream passage facilities are constructed.

16. Operation as a strictly run-of-the-river project with no artificial flow regulation and no impoundment fluctuations will prevent the aquatic habitat degredation associated with a cycling type of operation. By letter dated October 3, 1988, the N.H. Fish and Game Department recommended a license article requiring an instantaneous minimum stream flow of 757 cfs. The operation as proposed should assure that this standard is met.

17. The applicant proposes to improve the canoe portage route and the existing boat launch near the Johns River. Both of these facilities are on the

New Hampshire side. The Agency of Natural Resources finds that recreational use demands on the Connecticut are continuing to increase and that additional amentities to further enhance recreational use will be sought in the future.

18. Spillage of 210 cfs for protection of downstream water quality during the period June 1 through October 15 will also serve to restore to a degree the aesthetics of this river reach. This is particularly important during the high public recreational use period.

19. The State of New Hampshire certified this project under Section 401 on October 27, 1988, conditional on submittal of erosion control plans (although no construction is proposed at this time).

20. By letter dated July 24, 1989, the applicant filed a report with the Department through John R. Ponsetto, Esq. The report defines the water quality modeling runs performed to date, including recent Qual-2e modeling done using basically the same parameter values used before. No additional field data has been collected to refine the modeling attempts.

CONDITIONS

In certifying that there is a reasonable assurance that project activities will be conducted in a manner that will not violate applicable water quality standards, the Department of Environmental Conservation imposes the following conditions:

A. The project shall be operated in a strict run-of-the-river mode where instantaneous flows below the tailrace are maintained equivalent to instantaneous inflows to the impoundment. The pond level shall be maintained at or within six inches of the top of the flashboards at all times except

where circumstances beyond the control of the applicant occur, such as the loss of flashboards. Under such unusual circumstances, a minimum instantaneous flow of 757 cfs, or instantaneous project inflow, if less, shall be maintained below the tailrace until normal operations are restored. There shall be no impoundment cycling for generation.

A minimum instantaneous flow of 210 cfs shall be spilled at the dam during the period June 1 through October 15 to protect downstream water quality. When the project is not operating, all inflows shall be spilled at the dam.

The applicant shall submit a complete description, hydraulic design calculations, and specifications for the operational procedures and measures to be used to meet this condition. The filing shall be made within six months of the date of this certification and shall be subject to Departmental approval. All necessary modifications shall be instituted within one year of the date of this certification.

B. The impoundment shall not be drawn down for maintenance purposes without prior written approval of the Department.

C. Downstream fish passage facilities, as approved by the Vermont Department of Fish and Wildlife and the U.S. Fish and Wildlife Service, shall be constructed within one year of a request made by those agencies and operated following a schedule determined by the agencies. Flows needed to operate the bypass facility shall be in addition to those spillage flows required in Condition A for water quality. The final plans and approval letters shall be filed with the Department for the record prior to construction of these facilities. Erosion and sediment control and water management plans for the construction of these facilities shall be filed with

the Department for approval. Construction shall not proceed without approval of these plans.

D. Provision of upstream passage facilities, which may consist of participation in the construction and operation of a trap-and-truck facility at a downstream site, shall follow a schedule determined appropriate by the Vermont Department of Fish and Wildlife. Erosion and sediment control and water management plans for the construction of these facilities, if located at Gilman Dam, shall be filed with the Department for approval. Construction shall not proceed without approval of these plans. Plans for a facility at Gilman Dam are subject to the approval of the Vermont Department of Fish and Wildlife, and, in such case, the approval letter and design drawings must be filed with the Department for the record.

E. Debris associated with project operation, including trashrack debris, shall be disposed of properly.

F. Any desilting of the dam impoundment shall be done in accordance with the Agency of Natural Resources *Desilting Policy*, a copy of which is attached. The Department shall be contacted prior to any desilting activity.

G. Any significant changes, including project operation, shall be submitted to the Department for prior review and written approval.

Dated at Waterbury, Vermont this 28th day of July, 1989.

/s/ Timothy J. Burke
TIMOTHY BURKE
Commissioner
Department of
Environmental Conservation

TB:JRC/vld

APPENDIX D

STATUTES INVOLVED

A. RELEVANT PROVISIONS OF THE CLEAN WATER ACT, ALSO KNOWN AS THE FEDERAL WATER POLLUTION CONTROL ACT

1. Section 301 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1311, provides:

> **§ 1311. Effluent limitations**
>
> **(a) Illegality of pollutant discharges except in compliance with law**
>
> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
>
> **(b) Timetable for achievement of objectives**
>
> In order to carry out the objective of this chapter there shall be achieved—
>
> (1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314 (d) (1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources

as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of the Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314 (b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314

(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may

reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the

determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this

title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect

to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into

saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purpose of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a casual relationship between such characteristics and the ap-

plicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works

as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b) (1) (A) and (b) (1) (C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under para-

graph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987;

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagen-

[1] So in original. Probably should be "than".

icity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) COMPLIANCE REQUIREMENTS UNDER SUBSECTION (g).—

(A) EFFECT OF FILING.—An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) EFFECT OF DISAPPROVAL.—Disapproval of an application for a modification under subsection (g) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any spe-

cific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the

pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractual obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitaitons, the Administrator shall take into account any seasonal variations and the need

for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314 (g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent

limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

Every 6 months after February 4, 1987, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environ-

mental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined

area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

2. Section 302 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1312, provides:

> **§ 1312. Water quality related effluent limitations**
>
> **(a) Establishment**
>
> Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.
>
> **(b) Modifications of effluent limitations**
>
> **(1) Notice and hearing**
>
> Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.
>
> **(2) Permits**
>
> **(A) No reasonable relationship**
>
> The Administrator, with the concurrence of the State, may issue a permit which

modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

3. Section 303 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1313, provides:

> **§ 1313. Water quality standards and implementation plans**
>
> **(a) Existing water quality standards**
>
> (1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is a waiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.
>
> (2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972.

If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the

applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the

quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317 (a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator

determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section

1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning

the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning

process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

4. Section 306 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1316, provides:

§ 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included

in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as re-

quired by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

5. Section 307 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1317, provides:

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transporta-

tion of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature

and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other

toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) Pretreatment standards hearing; promulgation; compliance period; revision; application to State and local laws

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by

the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) New sources of pollutants into publicly owned treatment works

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated

under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

(e) Compliance date extension for innovative pretreatment systems

In the case of any facility that proposes to comply with the pretreatment standards of subsection (b) of this section by applying an innovative system that meets the requirements of section 1311(k) of this title, the owner or operator of the publicly owned treatment works receiving the treated effluent from such facility may extend the date for compliance with the applicable pretreatment standard established under this section for a period not to exceed 2 years—

(1) if the Administrator determines that the innovative system has the potential for industry-wide application, and

(2) if the Administrator (or the State in consultation with the Administrator, in any case in which the State has a pretreatment program approved by the Administator)—

(A) determines that the proposed extension will not cause the publicly owned treatment works to be in violation of its permit under section 1342 of this title or of section 1345 of this title or to contribute to such a violation, and

(B) concurs with the proposed extension.

6. Section 401 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1341, provides:

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable water at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under section 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time

(which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure com-

pliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may

result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully com-

menced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permitees, and to make an appropriate charge for such use. Moneys received from such li-

censees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

7. Section 510 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1370, provides:

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment stand-

ard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right of jurisdiction of the States with respect to the waters (including boundary waters) of such States.

B. RELEVANT PROVISIONS OF THE FEDERAL POWER ACT

1. Section 4(e) of the Federal Power Act, as codified at 16 U.S.C. § 797(e), provides:

> **§ 797. General Powers of Commission**
>
> The Commission is authorized and empowered—
>
> **(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.**
>
> To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Pro-*

vided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

2. Section 10(a)(1) of the Federal Power Act, as codified at 16 U.S.C. § 803(a)(1), provides:

> **§ 803. Conditions of license generally**
>
> All licenses issued under this subchapter shall be on the following conditions:
>
> **(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions**
>
> (1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title[2] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

3. Section 10(j) of the Federal Power Act, as codified at 16 U.S.C. § 803(j), provides:

> **(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings**
>
> (1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and

---

[2] So in original. Probably should be followed by "; and".

wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

> (A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.
>
> (B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

4. Section 15(a)(2)-(3) of the Federal Power Act, as codified at 16 U.S.C. § 808(a)(2)-(3), provides:

> **§ 808. New licenses and renewals**
>
> **(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered**
>
> (2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:
>
> (A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this subchapter.
>
> (B) The plans of the applicant to manage, operate, and maintain the project safely.
>
> (C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.
>
> (D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers,

including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.

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No. 92-1012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,
Petitioner

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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BRIEF OF *AMICI CURIAE* THE AMERICAN FOREST AND PAPER ASSOCIATION AND UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

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18 pp

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	5
I. *AMICI CURIAE* SEEK THIS COURT'S DETERMINATION OF THE LIMITED SCOPE OF A STATE'S AUTHORITY UNDER § 401 OF THE CWA TO PREVENT ADVERSE EFFECTS TO THE PAPER INDUSTRY	5
II. UNDER THE FPA, CONGRESS VESTED IN FERC BROAD AUTHORITY TO COMPREHENSIVELY EVALUATE AND BALANCE THE MANY ASPECTS OF THE PUBLIC INTEREST AFFECTED BY HYDROELECTRIC PROJECTS	7
A. Within Its Broad Jurisdiction, FERC Was Granted The Exclusive Authority To Consider And Protect The Aesthetics And Recreational Qualities Of A Hydroelectric Project	7
B. FERC Exercises Its Jurisdiction Over Aesthetics And Recreation By Imposing Conditions Which Supersede Any Imposed By The States	9
C. FERC's Exercise Of its Statutorily Mandated Authority To Balance Various Power And Non-Power Values, Including Aesthetics And Recreation, Precludes States From Doing So In The § 401 Water Quality Certificate	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

California v. FERC, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990) 3, 5, 7, 12, 13
First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152 (1946) 2, 3, 7, 11, 12
Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991) 3
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 7, 12
Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conservation, 1993 N.Y. App. Div. Lexis 65, 1993 WL 2586 (N.Y. App. Div. 1993) 3
Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190 (1983) 7, 12
In re Power Auth. v. Williams, 60 N.Y.2d 315, 457 N.E.2d 726 (1983) 4
Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982) 3
Summit Hydropower v. Commissioner of Envtl. Protection, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Conn. Sup. 1992) 3, 4
United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) 3

ADMINISTRATIVE DECISIONS

Appomattox River Water Auth., 58 FERC ¶ 62,115 (1992) 10, 11
Central Maine Power Co., 52 FERC ¶ 61,033 (1990) 4, 11
French Paper Co., 54 FERC ¶ 62,134 (1991) 7
Granite County, Montana, Montana Power Co. and Montana Power Co. & Granite County, Montana, 59 FERC ¶ 62,133 (1992) 9, 10, 11
International Paper Co., 51 FERC ¶ 62,330 (1990) 7
Joseph M. Keating, 60 FERC ¶ 61,016 (1992) 9, 10, 11
Long Lake Energy Corp., 58 FERC ¶ 62,041 (1992) 10, 11
Midtec Paper Corp., 56 FERC ¶ 62,226 (1991) 7

TABLE OF AUTHORITIES—Continued

	Page
Moon Lake Elec. Ass'n, 61 FERC ¶ 62,030 (1992)	9, 10, 11
Niagara Mohawk Power Corp., 58 FERC ¶ 62,114 (1992)	10, 11
Niagara Mohawk Power Corp., 61 FERC ¶ 62,170 (1992)	10
Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc., 58 FERC ¶ 61,347 (1992)	9, 10, 11
Pacific Gas and Elec. Co., 60 FERC ¶ 62,256 (1992)	9, 11
Summit Hydropower, 61 FERC ¶ 61,010 (1992)	9
Summit Hydropower, The Dayville Corp., 59 FERC ¶ 62,351 (1992)	9, 11
Summit Hydropower, 58 FERC ¶ 62,169 (1992)	9, 10, 11
Town of Summersville, 60 FERC ¶ 61,291 (1992)	4, 11

STATUTES

Federal Power Act, 16 U.S.C. §§ 797(e), 803(a) (1982 ed.)	
§ 4(e), 16 U.S.C. § 797(e)	8
§ 10(a), 16 U.S.C. § 803(a)	8
Federal Power Act, 16 U.S.C. §§ 791-828 (1988)	
§ 4(e), 16 U.S.C. § 797(e)	3, 8
§ 10(a)(1), 16 U.S.C. § 803(a)(1)	3, 8
§ 10(a)(3), 16 U.S.C. § 803(a)(3)	8
§ 15, 16 U.S.C. § 808	5
Clean Water Act ("CWA"), 33 U.S.C. § 1251-2623 (1988)	
§ 301, 33 U.S.C. § 1311	3
§ 302, 33 U.S.C. § 1312	3
§ 303, 33 U.S.C. § 1313	4
§ 306, 33 U.S.C. § 1316	3
§ 307, 33 U.S.C. § 1317	3
§ 401, 33 U.S.C. § 1341	*passim*
§ 401(a)(1), 33 U.S.C. § 1341(a)(1)	2
§ 401(d), 33 U.S.C. § 1341(d)	3, 4

REGULATIONS

18 C.F.R. §§ 380.1-380.14	9
18 C.F.R. § 380.3(c)(1)	9

TABLE OF AUTHORITIES—Continued

	Page
18 C.F.R. Part 4	9
18 C.F.R. § 4.38	8
18 C.F.R. Part 16	9
40 C.F.R. Part 131	4
40 C.F.R. § 131.2	5
40 C.F.R. § 131.5	5
40 C.F.R. § 131.6	5
40 C.F.R. § 131.10	5
40 C.F.R. § 131.11	5
Vermont Water Quality Standards VWQS Section 3-03	5
MISCELLANEOUS	
Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook* (April 1990)	6
Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986)	8
National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852	9

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---

BRIEF OF *AMICI CURIAE* THE AMERICAN FOREST AND PAPER ASSOCIATION AND UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The American Forest and Paper Association ("AFPA") and United Paper Workers International Union, AFL-CIO, CLC ("UPIU") submit this brief in support of the Petitioner Simpson Paper (Vermont) Company.[1]

AFPA is an association of the pulp, paper, paperboard and forest products industry which, as a group, is the third largest industrial purchaser of electricity from electric utilities in the United States, and is one of the Nation's leaders in the development and use of hydro-

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[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

electric power. The involvement of AFPA members as owners and operators of hydroelectric power under the Federal Power Act ("FPA") demonstrates AFPA's substantial interest in this proceeding.

UPIU is an international labor organization of paperworkers with members at paper mills, paper products plants, and other related industries throughout the United States and Canada. UPIU has over 225,000 members. UPIU's members are employed in numerous paper mills dependent on hydropower, and have a substantial interest in this case because of its impacts on the economics of paper production.

STATEMENT

Amici curiae adopt by reference the Statements of Statutory and Regulatory Background, The Gilman Hydroelectric Project, and Proceedings Below set forth in the Brief for the Petitioner Simpson Paper (Vermont) Company ("Simpson") with this Court.

The Court is asked to resolve an issue substantially similar to an issue which it faced in Iowa forty years earlier: whether Congress intended to allow states to regulate through permit requirements, such as the § 401 water quality certificate,[2] the very requirements that Congress has placed within the discretion of the Federal Energy Regulatory Commission ("FERC" or the "Commission") under the FPA. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 165 (1946). In light of the estimated 200 hydro projects, many of which are owned by paper and forest industries, to be relicensed by FERC between 1990 and 1993, as well as many others that must be relicensed in this decade, it is imperative that the

[2] Section 401(a)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1341(a)(1) (1988), requires an applicant for a federal license or permit for any activity which may result in a discharge into navigable waters of the United States to obtain a certification (or waiver thereof) from the state in which the discharge originates.

Court settle the federal question of the scope of a state's authority under § 401 so that FERC's mandate under the FPA to evaluate and balance all aspects of a hydro project prior to licensing or relicensing[3] is not undermined.

Section 401 was intended to authorize the states to issue a certificate relating *solely* to water quality.[4] States have begun to invade FERC jurisdiction by the imposition of conditions unrelated to water quality under § 401. States have had virtually unbridled discretion to impose such conditions because there is no lower federal court review.[5] Although a few states have restricted the scope of their § 401 certificates to water quality,[6] con-

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[3] *See* FPA §§ 4(e), 10(a)(1), 16 U.S.C. §§ 797(e), 803(a)(1) (1988).

[4] CWA 401(d), 33 U.S.C. 1341(d) (1988). § 401(d) of the CWA requires that state certifications impose limitations and monitoring requirements necessary to ensure compliance with: standards for effluent limitations under § 301 or § 302 of the CWA, 33 U.S.C. §§ 1311, 1312; national standards of performance for the control of discharges under § 306 of the CWA, 33 U.S.C. § 1316; or effluent pretreatment standards, including prohibiting the discharge of certain effluents, under § 307 of the CWA, 33 U.S.C. § 1317; and any other appropriate requirement of state law set forth in such certification. However, a "requirement of state law" that would otherwise impinge upon FERC's comprehensive authority over hydroelectric licensing would not be "appropriate." *See California v. FERC*, 495 U.S. 490, 506-07, *reh'g denied*, 110 S.Ct. 3304 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946).

[5] The lower federal courts have consistently held that the CWA requires that challenges to § 401 certifications be made in the state courts. *E.g., Roosevelt Campobello Int'l Park Comm'n. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989).

[6] *See, e.g., Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conservation*, 65306, 1993 N.Y. App. Div. Lexis 65, 1993 WL 2586 (N.Y. App. Div. January 7, 1993) (denying state statutory and regulatory requirements, including the imposition of recreational opportunities and the like, under § 401 because reserved by the FPA for determination at the Federal level); *Summit Hydro-*

sistent with the intent of § 401, other states have used the CWA § 401 process to impinge on FERC's authority,[7] thus creating a lack of uniformity in the interpretation of § 401.

The decision below in *Georgia-Pacific Corp. and Simpson Paper (Vermont) Co., Inc. v. Dept. of Envtl. Conservation and Sierra Club* (Pet. App. 1a-4a) clearly exemplifies state overreaching under § 401. The Supreme Court of the State of Vermont ("Vermont Supreme Court") upheld the Vermont Department of Environmental Conservation's ("Vermont") imposition of a continuous spillage condition in a § 401 water quality certificate on the grounds that "aesthetics" and "recreation" alone were appropriate grounds on which to justify the condition under § 401 (Pet. App. 3a).[8] Conditions based on "aesthetics" and "recreation", however, are within the exclusive jurisdiction of FERC and are unrelated to the § 401 water quality certification process.[9] Consequently,

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power v. Commissioner of Envtl. Protection, CV91-050-26-43, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Conn. Sup. July 20, 1992) (holding that a minimum spill requirement based on subjective aesthetic impact beyond the scope of the state agency's § 401 authority); *In re Power Auth. v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726 (N.Y. 1983) (determining whether a hydroelectric project would meet applicable water quality standards does not include balancing the need for the project against adverse environmental impacts under state energy law and master plan).

[7] *See infra* note 19.

[8] The Vermont Supreme Court never discussed or even indicated that this finding related to the quality of water in the Connecticut River.

[9] The Vermont Supreme Court seemingly relied on the language of § 401(d) of the CWA, 33 U.S.C. § 1341(d), which allows state certification to be conditioned on compliance with "any other appropriate requirement of state law". Although Vermont's Water Quality Standards ("VWQS"), approved pursuant to CWA § 303 and 40 C.F.R. Part 131, refer to aesthetics and recreation, aesthetics is designated as a "value" to be pursued, and recreation is desig-

to allow Vermont to impose the spill requirement, which would limit power production and force Simpson to purchase additional commercial power,[10] without any basis in objective water quality standards, would be to sanction Vermont's exercise of jurisdiction that is reserved exclusively for FERC.

ARGUMENT

I. *AMICI CURIAE* SEEK THIS COURT'S DETERMINATION OF THE LIMITED SCOPE OF A STATE'S AUTHORITY UNDER § 401 OF THE CWA TO PREVENT ADVERSE EFFECTS TO THE PAPER INDUSTRY

If states are allowed to continue their abuse of § 401 authority by imposing non-water quality conditions on a § 401 certificate, it will "fundamentally [] restructure a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California v. FERC*, 495 U.S. 490, 500, *reh'g denied*, 110 S.Ct. 3304 (1990). Under the FPA, FERC has the authority to issue original licenses and license renewals, which must be obtained when the original license term expires. § 15, 16 U.S.C. § 808 (1988). Presently FERC estimates that there are 320 existing licenses which are to expire before the year 2000, 55% of which are to expire

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nated as a "use" to be protected. VWQS, Section 3-03. The EPA, which approved such standards, however, indicated that "values" and "uses" are goals which are to be achieved through the implementation of objective, measurable water quality "criteria". *See* 40 C.F.R. §§ 131.2, 131.5, 131.6, 131.10, 131.11 (1992) (*See* Pet. Br., pp. 21-25).

[10] Simpson, in a letter dated May 20, 1992, to the Vermont Supreme Court, estimates substantial economic costs at $120,000 per year to comply with the aesthetic and recreational requirement (Pet. Br., p. 16 n.34).

in the year 1993.[11] A large percentage of these licenses are held by paper companies [12] due to historic mill locations along waterways and the inability to obtain utility system electricity early in this century at the mills' remote locations. Hydroelectric power provides this energy intensive industry with an inexpensive, clean, renewable source of energy. Curent holders of hydroelectric licenses, particularly in the paper industry, which have filed or will file for FERC relicensing will be profoundly affected by the states' exercise of jurisdiction in areas such as recreation and aesthetics because such jurisdiction has always resided with FERC. *See Infra* pp. 9-11. To sanction a state's imposition of recreation and aesthetic conditions through § 401 will not only create administrative inefficency from the duplicative and possibly conflicting efforts of individual states and FERC, but licensees' expectations as to anticipated recreation and aesthetic requirements for purposes of relicensing will be frustrated.

Moreover, if states are allowed to impose costly conditions unrelated to water quality, there will be far-reaching environmental and economic effects on the paper industry. Because many in the paper industry are disproportionately dependent on hydropower, states requiring onerous conditions under the guise of § 401 may reduce power available from existing projects, force hydropower plant shutdowns by denying certification, force shutdowns for economic reasons, or prevent proposed projects from being built. In some the elimination or reduction in the use of hydroelectric power by the paper industry will result in: a loss of an inexpensive, clean, renewable energy source only to be replaced by fossil fuel, which contributes to air and water pollution; [13] an

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[11] Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook* 1 (April 1990).

[12] Federal Energy Regulatory Commission, *supra* Note 11, §§ 6-9.

[13] In many instances, the mills may not be allowed, under their state air or water permits, to increase the use of fossil fuel to

increase in electric rates and financial hardship to ratepayers because they will have to purchase replacement power to serve the manufacturing plants; and a loss of benefits related to specific projects such as a tax base, job growth, business income, and environmental and recreational benefits.[14]

II. UNDER THE FPA, CONGRESS VESTED IN FERC BROAD AUTHORITY TO COMPREHENSIVELY EVALUATE AND BALANCE THE MANY ASPECTS OF THE PUBLIC INTEREST AFFECTED BY HYDROELECTRIC PROJECTS

A. Within Its Broad Jurisdiction, FERC Was Granted The Exclusive Authority To Consider And Protect The Aesthetics And Recreational Qualities Of A Hydroelectric Project

This Court has stated on several occassions that FERC has broad planning authority in the development and licensing of hydroelectric power under the FPA. *See California v. FERC*, 495 U.S. 490, 499, *reh'g denied*, 110 S.Ct. 3304 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982). Moreover, the Court has made clear that FERC has exclusive authority under the FPA to comprehensively evaluate and balance the many aspects of the public interest affected by hydroelectric projects. 495 U.S. at 499-500; 328 U.S. at 168.

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replace the loss of hydroelectric power thus forcing the mill to purchase very high cost electricity.

[14] In issuing licenses for hydroelectric projects, FERC assesses alternatives to the proposed projects. This includes examining the detrimental effects to the community in the event the project is not licensed as proposed. *See, e.g., Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc.*, 58 FERC ¶ 61,347 (1992); *Midtec Paper Corp.*, 56 FERC ¶ 62,226 (1991); *French Paper Co.*, 54 FERC ¶ 62,134 (1991); *International Paper Co.*, 51 FERC ¶ 62,330 (1990).

Section 4(e) of the FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e) (1982 ed.). Section 10(a) of the FPA also authorizes FERC to issue licenses subject to conditions that FERC deems best suited for power development and other public uses of the waters. 16 U.S.C. § 803(a) (1982 ed.). Congress' subsequent amendments to the above provisions explicitly state that FERC is to consider a project's effect on and adequate protection, mitigation and enhancement of beneficial public uses, including *recreation* opportunities, as well as "power and development purposes." 16 U.S.C. §§ 797(e), 803(a)(1) (1988). These 1986 amendments to the FPA, which require FERC to consider, *inter alia*, recreational opportunities and environmental quality as part of the licensing process, indicate that Congress intended such matters to remain within the Federal domain as factors to be balanced against other federal concerns, such as the power and development purposes of the proposed facility for which a license is sought. As Congress indicated in its Conference Report, "[i]f non-power values cannot be adequately protected, *FERC* should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986) (emphasis added). It is also instructive that Congress has directed FERC to consider any comprehensive plan prepared by a state, and FERC must solicit and entertain recommendations of state agencies regarding recreation, among other concerns. § 10(a)(3), 16 U.S.C. § 803(a)(3) (1988). Indeed, a consultation procedure insures that states will have an opportunity to have input on the panoply of non-power issues. 18 C.F.R. § 4.38 (1982). This is a further indication that environmental and conservation factors, including those relating

to aesthetics and recreation, of concern to a state are to be weighed at the Federal level.[15]

B. FERC Exercises Its Jurisdiction Over Aesthetics And Recreation By Imposing Conditions Which Supersede Any Imposed By The States

As mandated by the EPA, FERC takes very seriously its exclusive jurisdiction to balance competing interests, including recreation, aesthetics, and other non-developmental values equally with power and other developmental values in determining whether and under what conditions a license should be issued.[16] With respect to aesthetics and recreation, FERC independently examines any adverse effects of the project on aesthetic and recreational qualities of the project area and regularly imposes conditions in the license to mitigate such adverse effects, if any.[17]

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[15] In addition, under its regulations implementing the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. §§ 4321-4347 (1988)), FERC assesses potential impacts on water quality, fish, wildlife and botanical resources, historic and archeological resources, recreational resources, land management, and aesthetics. 18 C.F.R. §§ 380.1-380.14 (1982). Information FERC must evaluate is set forth in FERC's regulations establishing requirements for license applications. 18 C.F.R. Parts 4, 16. *See* 18 C.F.R. § 380.3(c)(1).

[16] *See, e.g., Summit Hydropower*, 61 FERC ¶ 61,010 (1992) (Rescinding a project license after taking into account all the circumstances of the case, including the various possible forms of mitigation and their effects on project economics, on the grounds that the unique recreational, aesthetic, and historical features of the site were of greater public benefit than the use of the site for water-power development).

[17] *See, e.g., Moon Lake Elec. Ass'n*, 61 FERC ¶ 62,030 (1992); *Pacific Gas and Elec. Co.*, 60 FERC ¶ 62,256 (1992); *Joseph M. Keating*, 60 FERC ¶ 61,016 (1992); *Summit Hydropower, The Dayville Corp.*, 59 FERC ¶ 62,351 (1992); *Granite County, Montana, Montana Power Co. and Montana Power Co. & Granite County, Montana*, 59 FERC ¶ 62,133 (1992); *Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc.*, 58 FERC ¶ 61,347 (1992); *Summit*

Such imposition of aesthetic and recreational licensing conditions are the result of the Commission staff's comprehensive review in an environmental assessment of the project. Although state consultation is a part of the federal process, FERC ultimately retains control over the imposition of aesthetic and recreational conditions by reserving the right to approve and require changes to the project plan.[18] FERC has clearly indicated that it is FERC's conditions relating to aesthetics and recreation, not those proposed by the state, that govern. *See, e.g., Niagara Mohawk Power Corp.*, 61 FERC ¶ 62,170 (1992) (noting the state of New York's request that any license issued for the project include a condition that requires the licensee to prepare a recreation plan and also cooperate with the state agency, FERC found that the recreational opportunities provided at the project met current demands; FERC ordered the licensee to consult with the appropriate agencies and prepare a recreation plan for the project, subject to Commission approval and modification, if and only if, a current ban on fishing downstream of the project was lifted which would result in a sharp increase in recreational use). In recent orders, FERC has recognized that states have begun to interfere with its jurisdiction to comprehensively evaluate projects by imposing conditions which are completely unrelated to the maintenance or improvement of water quality in their state certificates. FERC has indicated that conditions relating to recreation and aesthetics, *inter alia*,

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Hydropower, 58 FERC ¶ 62,169 (1992); *Niagara Mohawk Power Corp.*, 58 FERC ¶ 62,114 (1992); *Appomattox River Water Auth.*, 58 FERC ¶ 62,115 (1992); *Long Lake Energy Corp.*, 58 FERC ¶ 62,041 (1992).

[18] *See, e.g., Moon Lake Elec. Ass'n*, 61 FERC at 63,043; *Joseph M. Keating*, 60 FERC at 61,072; *Granite County, Montana, Montana Power Co. and Montana Power Co. & Granite County, Montana*, 59 FERC at 63,375; *Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc.*, 58 FERC at 62,138-39.

are beyond the scope of § 401 and pose actual or potential conflicts with the Commission's license.[19]

FERC also exercises continuing jurisdiction over aesthetics and recreation. FERC inserts an article in every license that in the event the licensee conveys fee title to, easements or rights-of-way across, or leases of project lands for specific, pre-approved purposes set forth in the license, the Commission "reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of the article, for the protection and enhancement of the project's scenic [and] recreational . . . values".[20]

C. FERC's Exercise Of Its Statutorily Mandated Authority To Balance Various Power And Non-Power Values, Including Aesthetics And Recreation, Precludes States From Doing So In The § 401 Water Quality Certificate

To give effect to Vermont's aesthetic and recreational conditions unrelated to water quality would interfere with Congressional intent to reside with the Commission the exclusive authority to balance the competing considerations affecting the public interest in hydroelectric licensing. As the Court stated in *First Iowa*, which involved a state's attempt to impose a similarily broad state permitting requirement on a hydroelectric project under the

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[19] *Town of Summersville*, 60 FERC 61,291, at 61,990 (1992) (State of West Virginia requiring licensee under the water quality certification to construct or provide a substantial number of recreation facilities; such as access roads and paths, low water stepping stone bridges, fish attraction structures, a boat launching facility, a residence and storage building, and to provide funds for fish and wildlife management programs) rehearing granted for purpose of further consideration; *Central Maine Power Co.*, 52 FERC ¶ 61,033, at 61,172 (1990) (State of Maine requiring in the water quality certificate that a schedule for the recreational facilities plan among other project operations be subject to state approval).

[20] *See* cases cited in note 17, *supra*, as examples.

jurisdiction of the FPC, to require the hydro applicant to secure a state permit would ultimately "vest in states a veto power over federal projects" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" which has been given to FERC. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946) (*"First Iowa"*).[21] The Court in *First Iowa* rejected the possibility of concurrent jurisdiction and interpreted the FPA as mandating divided powers and "a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." *Id.* at 171; *see id.* at 174 (no "divided authority over any one subject"); *id.* at 181 (comprehensive federal role "leave[s] no room or need for conflicting state controls"); *id.* at 168 ("Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority").

Recently, this Court reaffirmed *First Iowa* and reiterated that the federal government pre-empts states under the FPA. *California v. FERC*, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990) (*"California"*). In *California*, the Court found that the FPA and the federal license conditions established pursuant to the Act pre-empt the states' conditions concerning stream flow requirements because "it would disturb and conflict with the balance embodied in that considered federal agency determination." *Id.* at 506. According to the Court, Congress directed that in the FPA § 10(a) FERC and not the states should set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the

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[21] The broad and paramount federal regulatory role under the FPA, established in *First Iowa*, has been consistently upheld. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982).

project would be economically feasible, and thus further power development. *Id.* In light of this recent Court pronouncement, there should be little question that Vermont's requirements unrelated to water quality interfere and conflict with FERC's comprehensive statutorily-mandated authority to balance various power and non-power values, including aesthetics and recreational concerns. This issue is of national importance, as it will greatly affect the country's energy future.

CONCLUSION

Accordingly, *amici curiae* AFPA and UPIU respectfully request that the petition for a writ of certiorari filed by Simpson should be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,

Petitioner

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

On Petition for Writ of Certiorari to the Supreme Court of the State of Vermont

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BRIEF *AMICI CURIAE* OF CENTRAL VERMONT PUBLIC SERVICE CORPORATION, GREEN MOUNTAIN POWER CORPORATION, VERMONT MARBLE POWER DIVISION OF OMYA, INC., CITIZENS UTILITIES COMPANY, VERMONT INDEPENDENT POWER PRODUCERS ASSOCIATION and ASSOCIATED INDUSTRIES OF VERMONT IN SUPPORT OF THE PETITIONER, SIMPSON PAPER (VERMONT) COMPANY

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 6

STATEMENT OF THE CASE 7

ARGUMENT 7

I. DEC'S IMPOSITION OF CONDITIONS IN SIMPSON'S WATER QUALITY CERTIFICATE UNRELATED TO WATER QUALITY INTRUDES UPON THE JURISDICTION EXPRESSLY AND EXCLUSIVELY RESERVED TO FERC UNDER THE FPA. 7

A. The States' Role Under the CWA Is Limited To Preservation Of The Integrity Of Water And To Consideration Of The Impact Of Discharges On Water. 7

B. In The FPA, Congress Has Reserved To FERC Exclusive Jurisdiction To Consider And Decide Non-Water Quality Issues And To Balance All Issues Relating To Hydro-Electric Projects. 11

TABLE OF CONTENTS - Continued

Page

C. DEC Is Preempted By The Exclusive Jurisdiction Of FERC Under The FPA From Imposing Conditions In Water Quality Certificates Relating To Non-Water Quality Issues. 14

II. THE DECISION OF THE VERMONT SUPREME COURT IN *GEORGIA-PACIFIC* IS IN CONFLICT WITH DECISIONS OF THE COURTS OF OTHER STATES WITH RESPECT TO THE IMPORTANT FEDERAL QUESTION OF STATE INTRUSION IN THE EXCLUSIVE JURISDICTION OF FERC UNDER THE FPA. 17

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Cases

Page

Arnold Irrigation Dist. v. Department of Envtl. Quality, 717 P.2d 1274 (Or. App.), *review denied*, 726 P.2d 377 (Or. 1986) 17

Bangor Hydro-Elec. Co. v. Board of Envtl. Protection, 595 A.2d 438 (Me. 1991) 18, 19

California v. FERC, 495 U.S. 490, *reh'g. denied*, 497 U.S. 1040 (1990) 9, 12-15

Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395 (1975) 9

Citizens and S. Nat'l Bank v. Bougas, 434 U.S. 35 (1977) 19

de Rham v. Diamond, 295 N.E.2d 763 (N.Y. 1973) 18

First Iowa Hydro-Elec. Co-Op. v. FPC, 328 U.S. 152 (1946) 9, 13, 15

Fourth Branch Assoc. v. Department of Envtl. Cons., 550 N.Y.S.2d 769 (Sup. Ct. 1989) 17

Georgia-Pacific Corp. v. Department of Envtl. Cons., No. 91-530 (Vt. Sept. 14, 1992) . . . . . *passim*

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 9, 14-16

Long Lake Energy v. Department of Envtl. Cons., 563 N.Y.S.2d 871 (App. Div. 1990) 17

TABLE OF AUTHORITIES CITED - Continued

Cases - Continued

Page

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) 10

National Wildlife Fed'n v. Consumers Power Co.,
862 F.2d 580 (6th Cir. 1988) 8

National Wildlife Fed'n v. FERC,
912 F.2d 1471 (D.C. Cir. 1990) 13

National Wildlife Fed'n v. Gorsuch,
693 F.2d 156 (D.C. Cir. 1982) 8

Niagara Mohawk Power Corp. v. New York Dep't of Envtl. Cons., No. 65306, 1993 WL 2586
(N.Y. App. Div. Jan. 7, 1993) 18

Pennsylvania Dep't of Envtl. Resources v. City of Harrisburg, 578 A.2d 563
(Pa. Commonw. 1990) 17

In re Power Auth. v. Williams,
457 N.E.2d 726 (N.Y. 1983) 17, 18

Roosevelt Campobello Int'l Park Comm'n v. EPA,
684 F.2d 1041 (1st Cir. 1982) 3

Save Our Community v. EPA,
971 F.2d 1155 (5th Cir. 1992) 8

Sayles Hydro Assoc. v. Maughan, No. 91-15934,
1993 WL 17730 (9th Cir. Feb. 1, 1993) 13, 16

TABLE OF AUTHORITIES CITED - Continued

Cases - Continued

Page

Scenic Hudson Cons. Conf. v. FPC,
354 F.2d 608 (2d Cir. 1965) 12

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 15

Springfield, Town of v. Vermont Envtl. Bd.,
521 F.Supp. 243 (D. Vt. 1981) 16

Summit Hydropower v. Comm'r of Envtl. Protection,
No. CV91050 26 43, 1992 WL 175241
(Conn. Super. July 26, 1992) 17

Udall v. FPC, 387 U.S. 428 (1967) 12

United States v. Marathon Dev. Corp.,
867 F.2d 96 (1st Cir. 1989) 12

Statutes

FEDERAL POWER ACT, 16 U.S.C. § 792 *et seq.* (1985 & Supp. 1992)

§ 1, 16 U.S.C. § 792 . . . . . 2, 3

§ 4(e), 16 U.S.C. § 797(e) 6, 10, 12

§ 10(a), 16 U.S.C. § 803(a) 10, 12

§ 10(j), 16 U.S.C. § 803 (j)(1)-(2) 13

TABLE OF AUTHORITIES CITED - Continued

Statutes - Continued

Page

CLEAN WATER ACT, 33 U.S.C. § 1251 *et seq.* (1986 & Supp. 1992)

§ 101(a), 33 U.S.C. § 1251(a) 3, 8

§ 101(b), 33 U.S.C. § 1251(b) 8

§ 301(a), 33 U.S.C. § 1311(a) 8

§ 401(a), 33 U.S.C. § 1341(a) 3, 8, 14

§ 401(a)(1), 33 U.S.C. § 1341(a)(1) 3, 12

§ 401(d), 33 U.S.C. § 1341(d) 9-11

§ 502(6), 33 U.S.C. § 1362(6) 8

§ 502(12), 33 U.S.C. § 1362(12) 8

§ 502(14), 33 U.S.C. § 1362(14) 8

§ 502(16), 33 U.S.C. § 1362(16) 8

§ 502(19), 33 U.S.C. § 1362(19) 8

Vt. Stat. Ann. tit. 10, § 1004 (Supp. 1992) 3

TABLE OF AUTHORITIES CITED - Continued

Other Authorities

Page

Memorandum from J.S. Duckworth, Chief, Eng'g Section East Branch, FERC, *Fossil Fuel Generation Equivalents and Pollutants* (Dec. 3, 1992) 5

In re Petition of Twenty-Four Vermont Utilities, Pub. Serv. Bd. No. 5330, order (Oct. 12, 1990), *modified* Jan. 7, 1991, *and aff'd,* 3 VT. L.W. 285 (Oct. 2, 1992) 4

VERMONT DEP'T OF PUBLIC SERVICE, VERMONT COMPREHENSIVE ENERGY PLAN (1991) 3, 4

VERMONT DEP'T OF ECON. DEV., ANNUAL REPORT (1991) . . 3

Water Quality Certificate (P.L. 92-500, Section 401): *In re Vermont Marble Company,* Center Rutland Hydroelectric Project, Vt. Dep't of Envtl. Conservation, November 20, 1992 4

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INTEREST OF *AMICI CURIAE*

Amici curiae represent interests that are affected directly and adversely by the decision of the Vermont Supreme Court in

Georgia-Pacific Corp. v. Department of Envtl. Cons., Vermont Supreme Court, No. 91-530 (Sept. 14, 1992). Central Vermont Public Service Corporation ("CVPS")[1], Green Mountain Power Corporation ("GMP")[2], Vermont Marble Power Division of OMYA, Inc. ("VMPD")[3], Citizens Utilities Company ("CU")[4], and the members of Vermont Independent Power Producers Association ("VIPPA")[5] are owners and operators of hydroelectric generation projects located in Vermont that are subject to the licensing requirements of the Federal Power Act ("FPA"), 16

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[1] CVPS is the largest electric utility in the State of Vermont, serving 132,000 customers, and, through a subsidiary, 10,000 customers in New Hampshire. CVPS' customers include residential consumers as well as industrial and commercial customers who are engaged in interstate and foreign commerce. CVPS operates 20 hydroelectric projects that provide approximately 6% of the supply of electricity needed to meet the requirements of CVPS' customers. Ten of the CVPS projects presently are at various stages of relicensing.

[2] GMP is the second largest utility in Vermont, serving approximately 77,000 residential, industrial and commercial customers in Vermont. Approximately 10% of the energy demand required by GMP's customers is served by eight hydroelectric generation projects located in Vermont. One of those projects presently is engaged in relicensing.

[3] VMPD supplies electricity to municipal, residential and commercial customers located in the Towns of Proctor and Pittsford, Vermont and to its own industrial operations, which are engaged in energy intensive mineral processing in competition with entities from around the United States and from foreign nations. VMPD's electrical load is the fifth largest in the State of Vermont. Of its several hydroelectric projects, VMPD's Center Rutland Project (FERC No. 2445) presently is involved in relicensing. That Project has been operated by VMPD since 1898 and is the smallest of the hydroelectric projects operated by VMPD, which together account for 40% of its electrical requirements.

[4] CU, which is headquartered in Connecticut, supplies electricity to over 18,000 industrial, commercial and residential customers in Vermont. CU owns one hydroelectric project in Vermont that presently is engaged in relicensing.

[5] VIPPA represents the interests of non-utility generators of hydroelectric energy. VIPPA's approximately four dozen members produce, in the aggregate, approximately 50 megawatts of hydroelectric power, or about 5% of the total electric load in Vermont.

U.S.C. § 792 *et seq.* (1985 & Supp. 1992), and to review under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, 1341 (1986 & Supp. 1992).[6] Collectively, CVPS, GMP, VMPD and CU supply electricity to over eighty percent of the population of Vermont[7], including the members of Associated Industries of Vermont ("AIV")[8].

In *Georgia-Pacific*, the Vermont Supreme Court affirmed the Department of Environmental Conservation of the Vermont Agency of Natural Resources ("DEC")[9] imposition of conditions in a water quality certificate unrelated to water quality as part of the licensing

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[6] Applicants for a federal license for an activity that may result in a discharge into the navigable waters of the United States must provide the federal agency with a certification from the state in which the discharge originates that such discharge will comply with applicable provisions of the CWA. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Throughout this brief, such a certification from a state will be called a "§ 401 certification" or a "water quality certificate".

[7] Hydroelectricity supplies 44% of the electric energy consumed in Vermont. Just under 9% of Vermont's electric energy is generated by in-state hydroelectric projects. VERMONT DEP'T OF PUB. SERV., VERMONT COMPREHENSIVE ENERGY PLAN 72 (1991). The cost of energy is of significant concern to economic development in Vermont. VERMONT DEP'T OF ECON. DEV., ANNUAL REPORT 15 (1991).

[8] AIV is a trade association representing over 500 manufacturers and industrial employers located in the State of Vermont that are supplied electricity by the other *amici curiae*. AIV's membership represents 20% of the annual demand for electrical energy consumed in Vermont. Any loss of and any increased cost of producing electricity would be borne to a great extent by the members of AIV. Such an impact would have serious ramifications for AIV's members, not only with regard to the costs encountered by each, but also on their ability to compete interstate and worldwide.

[9] The Agency of Natural Resources, which contains the Department of Environmental Conservation, is the certifying agent for the State of Vermont for purposes of § 401 of the CWA. VT. STAT. ANN. tit. 10, § 1004 (Supp. 1992). Review of state action in issuing a § 401 certification is through the state courts and, ultimately, this Court. *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

of a federally regulated hydroelectric project.[10] If the decision of the Vermont Supreme Court is allowed to stand, similar conditions undoubtedly will be imposed on *amici curiae* who operate hydroelectric projects in Vermont.[11] Such conditions imposed on the projects owned by CVPS, GMP, VMPD and CU and the members of VIPPA will cause adverse economic and environmental consequences.[12] Similar conditions imposed on only those hydroelectric projects of CVPS, GMP, VMPD and CU presently engaged in

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[10] While the conditions approved by the Vermont Supreme Court in *Georgia-Pacific* based on aesthetic and recreational factors may be socially desirable, they are not directly related to "water quality" and they exceed the authority of the States under the CWA.

[11] DEC has indicated to CVPS that it intends to impose, in its projects' water quality certificates, spillage requirements similar to, or in excess of, those imposed upon Simpson for aesthetic, recreation, habitat enhancement and similar non-water quality specific reasons. GMP and CU have received from DEC requests to undertake studies relating to recreation and the aesthetic impact of water spilling over their dams and DEC has indicted that it will seek spill requirements similar to those imposed on Simpson. On November 20, 1992, DEC issued a § 401 certification to VMPD that included the requirement to spill water over the face of the Center Rutland dam at all times during the period April 1 through October 31 in order, *inter alia*, to afford a "meaningful visual attraction" for public viewing and recreational use in the project area. DEC also included requirements to submit a plan for downstream fish passage, in the event future fishery management necessitates such passage, and to provide a canoe portage around the dam together with fishing and other public access. Water Quality Certificate (P.L. 92-500, Section 401) *In re Vermont Marble Company*, Center Rutland Hydroelectric Project, Vt. Dep't of Envtl. Cons., Nov. 20, 1992.

[12] The purchase of replacement power from alternate sources, presently available from fossil-fueled thermal or nuclear generation facilities, would have adverse environmental effects in comparison to hydroelectric projects, including global warming effects, acid deposition from various oxide emissions, thermal discharges, airborne contaminants as well as effects on human health. VERMONT COMPREHENSIVE ENERGY PLAN at 10-18. The Vermont Public Service Board recently determined that, "(with the exceptions of biomass and cogeneration at sites with existing steam loads) hydroelectricity, is the best environmental choice for Vermont." *In re Petition of Twenty-Four Vermont Utilities*, Pub. Serv. Bd. No. 5330, order at 161 (Oct. 12, 1990), *modified* Jan. 7, 1991, *and aff'd*, 3 VT. L. W. 285 (Oct. 2, 1992).

relicensing will cause an annual energy loss of 12,769,000 kilowatt hours, annual cost of replacement power of $1,039,000 and annual emission of 48 tons of oxides of nitrogen, 104 tons of sulphur dioxide and 12,300 tons of oxides of carbon.[13] Those effects do not include the costs and impacts of other non-water quality specific conditions.[14]

Amici curiae, their customers, investors and members are directly and adversely affected by the Vermont Supreme Court's decision in *Georgia-Pacific*. Furthermore, *amici curiae* are representative of the thousands of hydroelectric generation projects, and millions of customers and ratepayers throughout the country who will suffer if state agencies are permitted to usurp the comprehensive authority granted by Congress to the Federal Energy Regulatory Commission ("FERC") under the FPA. While state agencies have been granted authority to administer appropriate water quality requirements under the CWA, Congress has required that FERC, and not the states, undertake the balancing of interests, including recreation and aesthetic values, necessary to the comprehensive development of this Nation's water-power resources. By permitting DEC to regulate recreational and aesthetic values, unrelated to water quality, through conditions imposed in the water quality certificate issued to Petitioner, Simpson Paper (Vermont) Company ("Simpson"), the Vermont Supreme Court has acted

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[13] Calculations based upon Memorandum dated December 3, 1992 from J. S. Duckworth, Chief, Eng'g Section East Branch, FERC, *Fossil Fuel Generation Equivalents and Pollutants* (Dec. 3, 1992).

[14] *Georgia-Pacific* raises additional concerns for VIPPA. The hydroelectric projects operated by VIPPA's members sell electricity on a fixed-price basis over contract terms extending as long as 30 years. Accordingly, the financial viability of those projects would be adversely affected by the loss of revenues resulting from the imposition of conditions in § 401 certifications that require additional spillage of water.

contrary to the express language and intent of the CWA and its decision threatens the uniform, federally managed licensing of hydroelectric projects under the FPA.

Amici curiae respectfully submit the following brief in support of Petitioner. Written consent to the filing of this brief has been granted by counsel for all parties and the originals of such consents accompany this brief.

SUMMARY OF ARGUMENT

The impacts of *Georgia-Pacific* on *amici curiae* compel them to support Simpson's Petition, but it is the conflict between the Vermont Supreme Court's decision and federal law, as expressed in the FPA and the CWA and as interpreted by the courts of other states, that requires review by the Court. The Vermont Supreme Court's decision in *Georgia-Pacific* confers on DEC broad powers to condition or even to deny water quality certificates for hydroelectric projects in furtherance of goals or objectives unrelated to water quality thereby effectively denying the federal license. *Amici curiae* do not contend that non-water quality issues, including recreation and aesthetics, are not within the general ambit of the state's regulatory authority. Non-water quality issues cannot, however, be regulated by states within the context of the FPA and the CWA because Congress has vested in FERC the exclusive authority to license hydroelectric generation projects in connection with a comprehensive, coordinated national program "for the development . . . of power . . . from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . ." FPA § 4(e), 16 U.S.C. § 797(e) (Supp. 1992). Under the CWA, Congress assigned to the states a decision-making role in the licensing process, but that role is limited to the issuance, conditioning or denial of water quality certificates under § 401 of the CWA based

upon water quality standards. Under the FPA, the states may make recommendations on non-water quality issues, but it is FERC that must make the licensing decisions.

The Vermont Supreme Court's decision in *Georgia-Pacific* exceeds the limited authority of the states under the CWA, intrudes upon the authority that Congress reserved to FERC under the FPA and is in conflict with decisions of courts of other states that have determined that actions by state regulatory authorities, essentially similar to those approved in *Georgia-Pacific*, encroach upon and are preempted by the exclusive jurisdiction of FERC.

STATEMENT OF THE CASE

The case is as stated by Petitioner.

ARGUMENT

I. DEC'S IMPOSITION OF CONDITIONS IN SIMPSON'S WATER QUALITY CERTIFICATE UNRELATED TO WATER QUALITY INTRUDES UPON THE JURISDICTION EXPRESSLY AND EXCLUSIVELY RESERVED TO FERC UNDER THE FPA.

A. The States' Role Under The CWA Is Limited To Preservation Of The Integrity Of Water And To Consideration Of The Impact Of Discharges On Water.

Contrary to the decision in *Georgia-Pacific*, it is impermissible for DEC to incorporate into Simpson's water quality certificate conditions unrelated to the chemical, physical and biological integrity of water. The CWA, by its express terms, is concerned with the discharge of pollutants and the restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's

waters." CWA § 101(a), 33 U.S.C. § 1251(a). The states have primary responsibility to prevent "man-made . . . alteration of the chemical, physical, biological, and radiological integrity of water." CWA §§ 101(b), 502(19), 33 U.S.C. §§ 1251(b), 1362(19) (1986). Section 301 of the CWA specifically makes it unlawful for any person to "discharge . . . any pollutant" except in compliance with that and other sections of the Act. CWA § 301, 33 U.S.C. § 1311(a) (1986).[15] Water quality certificates are required only in instances where a federally licensed hydroelectric project may result in a discharge into the navigable waters.[16] CWA § 401(a), 33 U.S.C. § 1341(a).

By the very language of the CWA, the states have primary responsibility for the integrity of water and the impact on water quality of discharges from a federally licensed activity. The CWA

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[15] The CWA defines "discharge of a pollutant" and "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source . . . ." CWA § 502(12), 33 U.S.C. § 1362(12) (1986) (emphasis added). A "point source" means "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14) (Supp. 1992). When used without modifier, a "discharge" includes a "discharge of a pollutant, and a discharge of pollutants." CWA § 502(16), 33 U.S.C. § 1362(16) (1986). The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6) (1986).

[16] In *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the court held that five elements must be present for a "discharge" to be found under the CWA: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *Id.* at 165 (emphasis in original). An "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175. *See also National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988). "The existence of discharge is critical. . . . On the face of the statute, it is the requirement for statutory coverage." *Save Our Community v. EPA*, 971 F.2d 1155, 1163 (5th Cir. 1992).

affords the states no opportunity to impose conditions in water quality certificates that are unrelated to water quality. In *Georgia-Pacific*, the Vermont Supreme Court relied solely on the clause in § 401(d) of the CWA that permits a water quality certificate to contain effluent limitations necessary to assure compliance with specified limitations or standards "and with any other appropriate requirement of State law set forth in such certification . . . ." CWA § 401(d), 33 U.S.C. § 1341(d). App. 3a.[17] The Vermont Supreme Court undertook no analysis of Congress' inclusion of the word "appropriate" preferring instead an interpretation of § 401(d) that would deem any requirement contained in a state's water quality standards to be appropriate regardless whether it relates to the integrity of water or to a discharge of pollutants.

What is an "other appropriate requirement of State law" under § 401(d) must be determined in the context of the CWA.[18] The requirements to which § 401 of the CWA refers are the state's "technology-based standards and water-quality based standards." *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). An "other appropriate requirement" must be based upon, limited to and of the same nature as technology-based and water-quality based standards for water. While aesthetics, recreation and scenic beauty not based on water quality may be appropriate values subject to regulation under the general police powers of the states, they are

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[17] References are to the Appendices to the Petition.

[18] A similar phrase, relating to the role of the states under the FPA, has been interpreted by this Court in context to mean "other [requirements] of the same nature." *See California v. FERC*, 495 U.S. 490, 498, *reh'g denied*, 497 U.S. 1040 (1990); *First Iowa Hydro-Elec. Co-op. v. FPC*, 328 U.S. 152, 175-76 (1946); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975) ("The terms that precede 'other project works,' . . . indicate a congressional intent to limit the breadth of that general phrase . . . .")

not "technology-based standards and water-quality based standards"[19] subject to regulation under the CWA or "appropriate" to condition water quality certificates under § 401(d). The inappropriateness of such non-water quality based standards is particularly evident under the FPA where Congress has given to FERC the exclusive jurisdiction and discretion to evaluate and balance against competing public interests the recreational and aesthetic impacts of hydroelectric projects. FPA §§ 4(e), 10(a), 16 U.S.C. §§ 797(e), 803(a) (Supp. 1992). Congress expressly has limited the states' involvement in the recreational and aesthetic impacts of such a project to making "recommendations" of proposed license conditions for FERC's consideration. FPA §§ 10(a)(3), 16 U.S.C. § 803(a)(3).

The power to condition is the power to deny. *Georgia-Pacific* opens the door to the imposition by DEC of non-water quality related conditions sufficiently onerous to constitute a denial of a license by FERC.[20] The court below ignored the intent of the CWA and of the FPA thereby exceeding the bounds of the CWA and intruding upon FERC's exclusive jurisdiction to determine a project's impacts on recreation and aesthetics. The Court should

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[19] The Vermont Supreme Court alludes to the "added deference afforded agency determinations in highly technical fields" in support of its conclusion that recreation and aesthetics constitute an "other appropriate requirement of State law." App. 4a. Conditions imposed in a water quality certificate relating to the aesthetic impressions of people viewing a dam from a bridge and recreational values of canoeing are subjective social values, not "highly technical" issues related to the chemical, physical and biological integrity of water. Vermont's water quality standards do not include any standards for, or definition of, aesthetics, recreation or scenic beauty much less their relationship to the impact of discharges on water. "Such esthetic [sic] judgments are necessarily subjective, defying objective evaluation . . . ." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

[20] Such conditions "shall become . . . condition[s]" of the FERC license. CWA § 401(d), 33 U.S.C. 1341(d).

grant certiorari to resolve the important federal question of the limit of the authority of the states under the CWA and the FPA and to prevent other states from interfering with FERC's exclusive jurisdiction and comprehensive role in the management and utilization of this Nation's water resources.

B. In The FPA, Congress Has Reserved To FERC Exclusive Jurisdiction To Consider And Decide Non-Water Quality Issues And To Balance All Issues Relating To Hydroelectric Projects.

It is appropriate that Congress, in enacting the CWA, reserved to the states the authority to protect the health and safety of their citizens from the discharge of pollutants and recognized the states' authority to adopt and implement water quality standards to achieve those ends. Where Congress has established a process for the uniform and comprehensive development of the Nation's water resources, however, it is equally appropriate that Congress conferred exclusive jurisdiction in FERC to undertake the more subjective process of balancing social issues, such as aesthetics, recreation and other environmental values not based on the chemical, physical and biological integrity of water.

Under the CWA, the states have primary responsibility for the integrity of water and the determination whether discharges of pollutants from a federally licensed activity will comply with applicable water quality requirements. If a state determines that compliance will be achieved, it will issue a § 401 certification, with conditions if appropriate, which then become part of the federal license. CWA § 401(d), 33 U.S.C. § 1341(d). If a § 401 certifi-

cation is denied, the federal license shall not be issued. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1).[21]

Under the FPA, FERC has exclusive authority to issue licenses for the development of power from the waters of the United States in which FERC must give equal consideration to fish and wildlife, recreation and the preservation of environmental quality. FPA § 4(e), 16 U.S.C. § 797(e).[22] Congress has assigned to FERC, and not to the states, the responsibility to include in licenses conditions as in the judgment of FERC will achieve those public interests. FPA § 10(a), 16 U.S.C. § 803(a) (emphasis added).

In *Georgia-Pacific*, the Vermont Supreme Court has delegated to the state precisely what Congress has delegated to FERC. Congress specifically has left to FERC the authority to oversee the regulation and development of water power and to balance such development against recreational, habitat, and other aspects of environmental quality implicated by the development. In *California*, this Court determined that a California law relating to stream flow was preempted by the FPA and held:

> By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while

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[21] Some courts have said that the Clean Water Act gives states a "veto" over the grant of federal licenses for activities potentially affecting a state's water quality. *See, e.g., United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989). If any such veto exists, it exists only with respect to the protection of a state's water quality and must be narrowly construed. *See infra* part II.

[22] FERC must balance the public interest and give consideration to "recreational purposes" under the FPA including the fisheries, wildlife and the importance of each in outdoor living and commerce. *Udall v. FPC*, 387 U.S. 428, 437-44, 450 (1967); *see also Scenic Hudson Cons. Conf. v. FPC*, 354 F.2d 608, 613, 624 (2d Cir. 1965) (FERC must consider the impact of a hydroelectric project on the natural beauty of the site).

> providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role. *See* 16 U.S.C. §§ 803(a)(1)-(3) [16 U.S.C.S. §§ 803(a)(1)-(3)] (FERC to issue license on conditions that protect fish and wildlife, after considering recommendations of state agencies), as amended by the Electric Consumers Protection Act of 1986; 16 U.S.C. §§ 803(j)(1)-(2) [16 U.S.C.S. §§ 803(j)(1)-(2)] . . . .

California, 495 U.S. at 499-500. The Court recognized, as it did in *First Iowa*, that Congress had limited the states' authority under the FPA to avoid establishing "divided authority over any one subject." *California*, 495 U.S. at 502 (quoting *First Iowa*, 328 U.S. at 174). In *Georgia-Pacific*, the Vermont Supreme Court has created divided authority over subjects not based on water quality.

While FERC must consider state concerns and recommendations for the protection of the environment, FERC is not required to adopt those recommendations. FPA § 10(j), 16 U.S.C. § 803(j) (Supp. 1992); *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1482 (D.C. Cir. 1990). By allowing DEC to determine non-water quality based subjects, the Vermont Supreme Court effectively has made FERC's role under FPA 10(j) redundant and meaningless. "There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Assoc. v. Maughan*, No. 91-15934, 1993 WL 17730, *4 (9th. Cir. Feb. 1, 1993). *Amici curiae* recognize

that the states have the power to ensure the integrity of water and that state water quality standards are complied with, but state authority with regard to non-water quality matters is limited to making recommendations to FERC.[23]

The Vermont Supreme Court erred in its determination that DEC had the authority to impose conditions in a water quality certificate that are not based on water quality. The result is a divided authority over non-water quality specific matters contrary to the intent of Congress. Such an intrusion into FERC's jurisdiction raises an important federal question that must be decided by this Court.

C. DEC Is Preempted By The Exclusive Jurisdiction Of FERC Under The FPA From Imposing Conditions In Water Quality Certificate Relating To Non-Water Quality Issues.

By the clear provisions of the FPA, FERC must consider the impact of a proposed development on environmental quality and must balance that impact against the development of water power. The states have an advisory role with regard to such considerations. Under the CWA, however, the states may deal only with the integrity of water and with water quality specific concerns arising from a discharge of pollutants. In *Georgia-Pacific*, the Vermont Supreme Court has affirmed DEC's invasion of FERC's jurisdiction

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[23] The most recent amendment to § 401 of the CWA was in 1977. *See* 33 U.S.C. § 1341. Congress was aware of § 401 certification requirements when it passed the 1986 amendments to the FPA. Had Congress desired the states' authority under § 401 certification to be as broad as the decision below proclaims, Congress would not have added the environmental protection provisions to FERC's authority. The fact that Congress gave that authority to FERC demonstrates Congress' intent not to allow the states to exercise the same authority. *California*, 495 U.S. at 499-500; *see International Paper Co.*, 479 U.S. at 494.

by approving the imposition of conditions in a water quality certificate in excess of the limited role reserved by Congress to the states in the CWA.

Under *Georgia-Pacific*, the states, in the guise of § 401 of the CWA, could "veto" projects on the basis of, or could establish conditions with regard to, fish and wildlife, the protection of recreational opportunities and the preservation of other aspects of environmental quality not based on water quality and without taking into consideration the balancing of interests under the FPA, all of which have been reserved exclusively to FERC. The states then could do indirectly, under the CWA, what they cannot do directly under the FPA. *See International Paper Co.*, 479 U.S. at 495, 497 ("It is unlikely--to say the least--that Congress intended to establish such a chaotic regulatory structure.").

With the exception of the limited authority given to the states in § 401 of the CWA, "the detailed provisions of the [FPA] providing for the federal plan of regulation leave[s] no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. Under *Georgia-Pacific*, DEC is placed in direct conflict with the authority of FERC under the FPA and stands as an obstacle to the balanced review of water power projects that is in the exclusive jurisdiction of FERC. "A state measure is 'pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *California*, 495 U.S. at 506 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)); *International Paper Co.*, 479 U.S. at 494.

The Ninth Circuit Court of Appeals has rejected as contrary to FPA California's efforts to require a hydroelectric project to under-

take studies to assure that the project would comply with state concerns regarding aesthetics, recreation, sport fishing and cultural resources. *Sayles*, 1993 WL 17730. The court held "[t]he state process itself would be an obstacle to the accomplishment of the full purposes and objectives of Congress in authorizing [FERC] to license the project to proceed." *Id.* at *4.[24]

The decision in *Georgia-Pacific* affirms DEC's consideration of non-water quality based aesthetics and recreation thereby upsetting the balance intended by Congress between the FPA and the CWA. Vermont is preempted when it ventures beyond the express provisions of § 401 and imposes an obstacle to the balancing of competing public interests that Congress left exclusively to FERC. The Court should grant the Petition to deal with the important federal question presented by state action inconsistent with the full purposes and objectives of Congress.

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[24] Similarly, an attempt to exert jurisdiction under Vermont's environmental law to evaluate environmental impacts relating to the relocation of a highway and the development of a recreation area in connection with a hydroelectric project raised an important federal question of intrusion upon the exclusive jurisdiction given to FERC. *Town of Springfield v. Vermont Envtl. Bd.*, 521 F.Supp. 243 (D. Vt. 1981). The Vermont Environmental Board was preempted in view of "a clear Congressional intent to bring all aspects of the hydroelectric project within the purview of the federal regulatory scheme." *Id.* at 249. While neither *Sayles* nor *Springfield* involved the issuance of a water quality certificate, the preemptive scope of federal law here is the same as in those two cases. *International Paper Co.*, 479 U.S. at 499 n.20 ("[T]he pre-emptive scope of the CWA necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress.'") (emphasis in original, citations omitted).

II. THE DECISION OF THE VERMONT SUPREME COURT IN *GEORGIA-PACIFIC* IS IN CONFLICT WITH DECISIONS OF THE COURTS OF OTHER STATES WITH RESPECT TO THE IMPORTANT FEDERAL QUESTION OF STATE INSTRUSION IN THE EXCLUSIVE JURISDICTION OF FERC UNDER THE FPA.

Courts of other states, presented with the issue of the scope of the state's authority under § 401 of the CWA with regard to hydroelectric projects subject to licensing under the FPA, have determined that the state's role is narrow and carefully limited. The decision below is in conflict with those of other states. *Summit Hydropower v. Comm'r of Envtl. Protection*, No. CV91050 26 43, 1992 WL 175241 (Conn. Super., July 26, 1992); *Pennsylvania Dep't of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. Commonw. 1990); *Long Lake Energy v. Department of Envtl. Cons.*, 563 N.Y.S.2d 871 (App. Div. 1990); *Fourth Branch Assoc. v. Department of Envtl. Cons.*, 550 N.Y.S.2d 769 (Sup. Ct. 1989); *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. App.), *review denied*, 726 P.2d 377 (Or. 1986); *In re Power Auth. v. Williams*, 457 N.E.2d 726 (N.Y. 1983). In *Williams*, the highest court of New York held:

> The certification referred to in the Federal Clean Water Act . . . is simply of compliance with section 303 of the Federal statute . . . . To extend that process, as the order of the Appellate Division would do, to consideration of countervailing energy and environmental interests . . . would be to countenance both a failure by the commissioner to perform the function reserved to him under [the CWA] and an intrusion by him in the area of responsibility pre-empted for the Federal agency.

457 N.E.2d at 730 (citation and footnote omitted).[25] To extend the process, as the Vermont Supreme Court has done, is an intrusion in the area of responsibility preempted for FERC.

Following *Williams*, the New York Supreme Court, Appellate Division, affirmed a lower court ruling that federal preemption precluded the Department of Environmental Conservation of that state from requiring a project subject to § 401 certification to undergo sweeping review of such items as disturbance of stream beds, dam construction, dam safety, reservoir releases and other environmental matters. *Niagara Mohawk Power Corp. v. New York Dep't of Envtl. Cons.*, No. 65306, 1993 WL 2586 (N.Y. App. Div. Jan. 7, 1993). The Appellate Division held "to allow [environmental and conservation factors of concern to a state] to serve as a predicate for a state 'veto' of the project is indefensible for it would effectively undermine the intent of Congress." *Id.*, slip op. at 4 (citations omitted). It is indefensible for the Vermont Supreme Court to undermine the intent of Congress by allowing DEC to condition a water quality certificate on non-water quality bases.

Maine has recognized that, while it may be reasonable to request information relating to matters not limited to compliance with numerical standards for water chemistry, there is a point beyond which a state's action may exceed its jurisdiction. *Bangor Hydro-*

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[25] The *Williams* court relied heavily upon *de Rham v. Diamond*, 295 N.E.2d 763 (N.Y. 1973), which examined the predecessor to § 401, and determined that the FPA "pre-empts all State licensing and permit functions" with respect to hydroelectric projects relinquishing only one element to the states, that being the "narrow question" whether the federal project would violate applicable water quality standards. *de Rham*, 295 N.E.2d at 767-68. The state's narrow, defined role did not include consideration of the safety of a nearby aqueduct, appearance of the shoreline and protection of the river's fish, aside from effect that injury to fish, by the introduction of waste or pollutants, may have on the water quality standards. *Id.*

Electric Co. v. Board of Envtl. Protection, 595 A.2d 438, 440 (Me. 1991).[26] While Maine did not face the question of at what point a state may exceed its jurisdiction, it is that question that is before this Court. The Vermont Supreme Court did not consider just information requests in *Georgia-Pacific*; rather it approved the imposition of conditions in a § 401 certification on the basis of aesthetics and recreation, both of which exceed the jurisdiction of the state and are within the jurisdiction of and preempted for FERC.

The decision by the Vermont Supreme Court in *Georgia-Pacific* clearly and directly conflicts with the determination of the courts of other states on the important federal question of state intrusion in FERC's exclusive jurisdiction under the FPA. This Court will grant certiorari to resolve such conflicts. *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35, 37 (1977). Granting certiorari in the instant case would enable the Court to resolve the existing conflict over the role of the states in § 401 certification and to prevent further uncertainty and confusion as to the extent of that authority.

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[26] In *Bangor Hydro*, the Supreme Judicial Court of Maine stated: "Because the Board has had no opportunity to set any conditions of certification, the question whether it has exceeded its jurisdiction under § 401(d), 33 U.S.C. § 1341(d), is not before us." *Id.* at 443 (emphasis added).

CONCLUSION

For the reasons stated above, *amici curiae* support and respectfully request that the Petition for Certiorari be granted because of the important federal questions raised.

DATED: February 1993.

Respectfully submitted,

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(4)

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No. 92-1012

In The

Supreme Court of the United States

October Term, 1992

SIMPSON PAPER (VERMONT) COMPANY,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Vermont

JOINT RESPONSE OF THE STATE OF VERMONT, DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE SIERRA CLUB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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92 PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *ii*

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 6

I. THE VERMONT SUPREME COURT'S JUDGMENT RESTS ON ADEQUATE, ALTERNATIVE STATE GROUNDS NOT CHALLENGED BY SIMPSON 6

II. A STATE WATER QUALITY STANDARD NEED NOT BE QUANTITATIVE TO BE AN "APPROPRIATE REQUIREMENT OF STATE LAW" 9

III. THERE IS NO CONFLICT AMONG THE STATE COURTS CONCERNING THE ENFORCEABILITY OF "DESIGNATED USES" UNDER CWA § 401(d) 14

IV. CLAIMS NOW RAISED BY SIMPSON WERE NOT ADEQUATELY AND SQUARELY PRESENTED TO THE VERMONT SUPREME COURT 18

V. CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma, ___ U.S. ___, 112 S.Ct. 1046 (1992) 13

Arnoid Irrigation District v. Department of Environmental Quality, 717 P.2d 1274 (Or.App. 1986) ...14, 23

Avoyelles Sportsmen's League, Inc. v. Alexander, 511 F.Supp. 278 (W.D. La. 1981)..... 2

Bangor Hydro-Electric Co. v. Board of Environmental Protection, 595 A.2d 438 (Me. 1991)..... 16

Banker's Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 18, 20

Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546 (1991) 7

de Rham v. Diamond, 32 N.Y.2d 34, 295 N.E.2d 763 (1973) 16

Durley v. Mayo, 351 U.S. 277 (1956) 7

First Iowa Hydro-Electric Coop v. Federal Power Comm'n, 328 U.S. 152 (1946) 23

Herb v. Pitcairn, 324 U.S. 117 (1945)..... 7

Lanphere v. Beede, 141 Vt. 126, 446 A.2d 340 (1986) 18

Long Lake Energy v. Dept. of Env. Cons., 563 N.Y.S.2d 871 (A.D.3 Dept. 1990) 16

Michigan v. Long, 463 U.S. 1032 (1983).....7, 9

TABLE OF AUTHORITIES – Continued

Page

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 19, 20

Pennsylvania Dept. of Environmental Resources v. City of Harrisburg, 578 A.2d 563 (Pa.Cmwlth. 1990) 17

Power Authority v. Williams, 60 N.Y.2d 315 N.E.2d 726 (1983) 16

Summit Hydropower v. Commissioner of Environmental Protection, LEXIS 2177, 23 17

Vermont v. New Hampshire, 289 U.S. 593 (1933) 22

Webb v. Webb, 451 U.S. 493 (1981) 18

STATUTES

3 Vt.Stat.Ann. § 2802(a)(5) (1987) 3

10 Vt.Stat.Ann. § 1004 (1987) 3

10 Vt.Stat.Ann. § 1252(b) (1991) 4

10 Vt.Stat.Ann. § 1253(b) (1987) 4

28 U.S.C. § 1257(a) 21

Clean Water Act ("CWA"), 33 U.S.C. § 1251-2623 (1988)

§ 101(a), 33 U.S.C. § 1251(a) 2

§ 102(b)(6), 33 U.S.C. § 1252(b)(6) 21

§ 303, 33 U.S.C. § 1313 ..... 4, 11, 15

§ 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) 11, 12

§ 401(a)(1), 33 U.S.C. § 1341(a)(1) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

§ 401(a)(2), 33 U.S.C. § 1341(a)(2) 13

§ 401(d), 33 U.S.C. § 1341(d) ..... *passim*

§ 502(16), 33 U.S.C. § 1362(16) 19

§ 502(19), 33 U.S.C. § 1362(19) 19

§ 510, 33 U.S.C. § 1370 ..... 13, 21, 22

Federal Power Act, 16 U.S.C. §§ 791-828 (1988)

§ 10(j), 16 U.S.C. § 803(j) 21

§ 15, 16 U.S.C. § 808 3

REGULATIONS

Supreme Court Rule 14.1(h) 18

18 C.F.R. § 4.38(c)(2) (1988) 3, 20

40 C.F.R. § 131.3(b) (1991) 11

40 C.F.R. § 131.10(g)(4) (1991) 12

Vermont Water Quality Standards

VWQS § 3-01(B)(1)(a) (1987) 4

VWQS § 3-03 (1987) 5, 10

MISCELLANEOUS

2A Singer, *Sutherland Statutory Construction*, § 47.07 20

H.Rep.No. 92-911, 92nd Cong. 2d Sess. 76-77 (1972) 2

No. 92-1012

In The

Supreme Court of the United States

October Term, 1992

SIMPSON PAPER (VERMONT) COMPANY,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Vermont

JOINT RESPONSE OF THE STATE OF VERMONT, DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE SIERRA CLUB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Connecticut River is New England's grandest and most important river. Rising in Northern New Hampshire, it flows the length of Vermont and New Hampshire and continues south through Massachusetts and Connecticut, where it finally meets the Atlantic.

The Connecticut is also a working river. It has been extensively developed to serve New England's industrial, waste disposal and electrical needs. The enactment of the

Clean Water Act, however, has obligated those who discharge into the River to share in the restoration and maintenance of its "chemical, physical and biological integrity." 33 U.S.C. § 1251(a).[1]

The Georgia-Pacific Corporation and its successor, the Simpson Paper Company (hereinafter referred to as "Simpson"), however, continue to strenuously avoid their obligations under the Clean Water Act. Simpson owns and operates the Gilman Dam in Lunenburg, Vermont which, together with its impoundment, were built in the early 1900s. Pet. App. 6a, 19a. It is operated as a hydroelectric generating facility; electricity produced by the dam powers Simpson's adjacent paper mill. Pet. at 11. The dam severely harms the Connecticut River's chemical, physical and biological characteristics by flooding several miles of the River and altering its natural flow. Pet. App. 7a-12a, 21a-26a. All water that was oxygenated as it flowed over the dam site's natural drop in elevation is now impounded and diverted under the dam and through its turbines and deprived of the natural aeration process. Pet. App. 20a-21a. What was once highly oxygenated, fast flowing white water is now flat water. What was once a riverine ecosystem is now a lake-like ecosystem.

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[1] The report of the House committee on Public Works which accompanied the House bill from which the Clean Water Act arose states that "the word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of the ecosystem is maintained." H.Rep.No. 92-911, 92nd Cong. 2d Sess. 76-77 (1972), reprinted in 1 Leg. Hist. 753, 763-64. *See also Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F.Supp. 278, 286 (W.D. La. 1981).

The dam's operation is governed by a license issued by the Federal Power Commission (now the Federal Energy Regulatory Commission) in 1965 with an effective date retroactive to January 1, 1941 and an expiration date of December 31, 1990.[2] Pet. at 11. That license adopted operating standards developed in the 1930s when the dam was first converted to a hydroelectric facility. Because it was issued well before the 1972 enactment of the Clean Water Act (CWA), the 1941 license does not contain any provisions to protect the Connecticut River's water quality.

In September of 1988, Simpson applied to the FERC for relicensure of the dam and simply proposed to continue operating the dam under the conditions of its 1941 license. Pet. App. 23a.

On August 3, 1988, as part of its application for relicensure, Simpson requested a water quality certificate from the Vermont Department of Environmental Conservation. *See* 33 U.S.C. § 1341(a)(1); 18 C.F.R. § 4.38(c)(2) (1988); 10 Vt.Stat.Ann. § 1004 (1987)[3]. Again, Simpson asked to continue operating the dam under the same terms as set forth in its 1941 license. Pet. App. 15a-16a. Simpson made no proposals to comply with the Clean

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[2] On January 17, 1991, the FERC issued an annual license allowing Simpson to continue operating the Gilman Dam under the terms of the 1941 license. *See* 16 U.S.C. § 808. The FERC is apparently awaiting the outcome of this matter before issuing Simpson's new license.

[3] The Department of Environmental Conservation is within the Vermont Agency of Natural Resources (VANR). 3 Vt.Stat.Ann. § 2802(a)(5) (1987).

Water Act or to otherwise address the dam's impact on water quality.[4] *Id.*

The portions of the Connecticut River relevant to this matter are Class B waters.[5] Pet. App. 3a, 11a, 20a-21a. Class B waters must be managed to assure compliance with water quality criteria established by Vermont's Water Quality Standards. The one criterion at issue in this matter is for dissolved oxygen (DO); the criterion requires that DO levels never fall below 6.0 mg/1 or 75% saturation. Vermont Water Quality Standard (Vt. WQS) 3-01(B)(1)(a) (1987).

The Water Quality Standards also establish beneficial values and uses for which the River must be managed.[6] Class B waters must be managed so that they consistently

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[4] Contrary to Simpson's claims, Pet. 13-14, and despite the DEC's repeated and timely entreaties, Simpson made no effort whatsoever to address the DEC's concerns over dissolved oxygen levels until well after Vermont had issued Simpson's Water Quality Certificate. Indeed, the Superior Court found that "the record before the DEC is bare of any formal presentation by plaintiffs of their proposed management plan despite knowledge as early as 1983 that DO deficits existed downstream of the dam." Pet. App. 15a-16a.

[5] A limited segment of the Connecticut downstream of the Gilman Dam was a Class C water because of the discharge of Simpson's mill wastes. Vermont has since eliminated Class C waters, 10 Vt.Stat.Ann. § 1253(b) (1987); this limited segment of the river is now considered a "waste management zone." 10 Vt.Stat.Ann. § 1252(d) (1991). The dam itself and the reach of the River affected by the DO deficits are, and at all times relevant to this matter have been, Class B waters.

[6] The Vermont Water Quality Standards refer to designated uses, 33 U.S.C. § 1313, as "beneficial values and uses."

exhibit good aesthetic value, provide high quality habitat for aquatic biota, fish and wildlife, and may be used for swimming and recreation. Vt. WQS § 3-03(A).

Vermont issued Simpson's water quality certificate on July 28, 1989. Pet. App. 28a. The certificate requires Simpson to spill 210 cubic feet of water per second (cfs) over the crest of the dam from June 1 through October 15 of each year for the express purpose of meeting Vermont's DO criterion. Pet. App. 23a-24a. In addition to the numerous findings relating to compliance with the DO criterion, Vermont found that spillage "will also serve to restore to a degree the aesthetics of this river reach. This is particularly important during the high public recreational use period." Pet. App. 26a.

Simpson, maintaining that it should be allowed to continue its "historical mode" of operation of the dam, petitioned the Vermont Superior Court for review of its water quality certificate. Record, Second Amended Complaint for Review (1/4/91) at 7. Simpson's exclusive claim, as framed by its Second Amended Complaint, related to compliance with Vermont's DO criterion. *Id.*

The Superior Court affirmed the water quality certificate. Pet. App. 17a. It made numerous, detailed findings supporting the DEC's conclusion that DO deficits caused by the dam necessitated the 210 cfs spillage requirement. Pet. App. 6a-12a. The Superior Court also held that "[t]he aesthetic determination forms a strong independent basis upon which to uphold the 210 cfs continuous spill requirement." Pet. App. 14a.

Simpson appealed to the Vermont Supreme Court. Simpson's primary claim was that there was insufficient

evidence in the record demonstrating that spillage was necessary to alleviate violations of Vermont's DO criterion. Resp. App. 18a-25a, 44a-58a. The Vermont Supreme Court affirmed.

REASONS FOR DENYING THE PETITION

Certiorari should be denied because, contrary to petitioner's assertions:

1. The Vermont Supreme Court's judgment rests on adequate, independent state grounds not challenged by Simpson.

2. The Vermont Supreme Court affirmed a proper exercise of state authority under § 401 of the Clean Water Act.

3. There is no division among any courts concerning the aesthetics and recreation issue addressed by the Vermont Supreme Court.

4. Arguments raised by Simpson were not raised before the Vermont Supreme Court, and in any event are groundless.

I. THE VERMONT SUPREME COURT'S JUDGMENT RESTS ON ADEQUATE, ALTERNATIVE STATE GROUNDS NOT CHALLENGED BY SIMPSON

Although the Vermont Supreme Court's *Entry Order* rests upon two independent, substantive grounds, Simpson's petition seeks review of only one of these grounds. Simpson does not dispute the Vermont Supreme Court's

primary conclusion that "[t]he spillage requirement was amply supported by the evidence" – evidence that details the need to continuously spill 210 cfs to comply with the dissolved oxygen criterion established by Vermont's Water Quality Standards.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This principle rests on "the jurisdictional concern [that the Court] not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' " *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (quoting *Herb*, 324 U.S. at 126). The Court's power pursuant to a writ of certiorari "is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S. at 126; *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2554 (1991).

Simpson bears the burden of establishing that the Vermont Supreme Court's judgment does not rest on independent state grounds. *Michigan v. Long*, 463 U.S. at 1042, n. 8; *Durley v. Mayo*, 351 U.S. 277, 285 (1956). Simpson cannot meet that burden, because the Vermont Supreme Court's decision provides a concise and "plain" statement of the independent state grounds upon which it rests. *See Michigan v. Long*, 463 U.S. at 1044.

Simpson's claim that the Vermont Supreme Court affirmed Simpson's water quality certificate "on the sole ground that aesthetics and recreation were an appropriate basis for the spill condition," Pet. 16, is without

foundation. Simpson framed the two substantive issues to which the Court responded: "Plaintiffs lastly contend that the spillage requirement was not supported by the evidence *and* that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement." Pet. App. 3a (emphasis added).

The Court ruled that the spillage requirement "was amply supported by the evidence." Pet. App. 3a. The evidence with which Simpson took issue related exclusively to compliance with Vermont's dissolved oxygen criterion. Resp. App. 18a-25a, 44a-58a. The Vermont Supreme Court thus concluded that compliance with the DO criterion warranted the spillage requirement.

The Court then held that "[n]ot only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement." Pet. App. 3a. The reference to ease of administration and monitoring was in direct response to Simpson's claim that its scheme to monitor and manage DO levels in the Connecticut River was arbitrarily rejected by the DEC. Resp. App. 16a, 23a-25a, 37a-44a. Indeed, the Superior Court's finding upon which the Vermont Supreme Court's reference is based states that:

> the [210 cfs spill flow] proposed by the VANR [Vermont Agency of Natural Resources] uses spill flow at the dam, an easily gaged [sic] and monitored parameter, to meet specific future DO goals downstream of the project. *The applicant's proposed water quality management plan, which depends on an unproven predictive water quality model, would be difficult to monitor and enforce for*

> *compliance with the goal of maintaining DO at the sag point.*

Pet. App. at 17a (emphasis added by the Superior Court).

Thus, even in addressing aesthetics and recreation, the Vermont Supreme Court made it clear that its holding on this issue was independent of compliance with the DO criterion. Furthermore, the words, "not only" plainly demonstrate that the Court did "not only" consider aesthetics and recreation as a basis for the spillage condition.

Simpson, despite having framed each of the issues to which the Vermont Supreme Court responded, claims to be "without explanation" for the Court's reference to "ease of administration and monitoring." Pet. 16 n. 35. Nor does Simpson offer an explanation for the Court's conclusion that spillage is amply supported by the evidence. The explanation is plain and simple – the Vermont Supreme Court based its judgment on compliance with Vermont's DO criterion as well as aesthetics and recreation. Simpson's petition should therefore be denied. *See Michigan v. Long*, 463 U.S. at 1042.

II. A STATE WATER QUALITY STANDARD NEED NOT BE QUANTITATIVE TO BE AN "APPROPRIATE REQUIREMENT OF STATE LAW."

Even if the Vermont Supreme Court's clear ruling concerning the quantitative dissolved oxygen criterion could be ignored, the challenged certification must still be upheld as a valid application of Vermont's power to apply its non-quantitative water quality standards – specifically, that portion of the standards that requires "water of a quality which consistently exhibits good aesthetic

value . . . and recreation." Vermont Water Quality Standards § 3-03, quoted at Pet. App. 3a.

Simpson's entire argument concerning aesthetics and recreation rests on a misrepresentation of what was actually decided below. According to Simpson, "[i]t is evident that the only concern of the Vermont tribunals regarding aesthetics and recreation was for the scenic vista which supposedly would be presented by water spilling over the Project crest gate to recreating tourists." Pet. 23-24. To the contrary, the DEC certificate clearly states:

> Spillage of 210 cfs *for protection of downstream water quality* during the period June 1 through October 15 will also serve to restore to a degree the aesthetics of this river reach. This is particularly important during the high public recreational use period.

Pet. App. 26a (emphasis added). It is this finding – not Simpson's imaginary finding concerning the aesthetics of cascading water – that was affirmed by the Vermont courts.

Once the clear water quality basis for the spillage condition is recognized, Simpson is left with the far narrower assertion that only *quantitative* water quality standards can form a proper basis for a § 401(d) condition on a certificate. Pet. 22 ("Management goals such as promotion of aesthetic 'values' and recreational 'uses' are to be achieved through implementation of specific, quantifiable 'criteria.' "). But § 401(d) authorizes conditions to ensure compliance with "any other appropriate requirement of State law," not "any other appropriate *quantitative* requirement of State law."

Indeed, not just designated uses, but criteria also, may be non-quantitative. 40 C.F.R. § 131.3(b) (1991) (criteria may be "expressed as constituent concentrations, levels, *or narrative statements* representing a quality of water that supports a particular use") (emphasis added). Simpson's insistence on quantitative rules would thus mean that some water quality *criteria* could be neither implemented nor enforced.

Moreover, excluding the non-quantitative portions of a state's water quality standards from § 401(d) would produce results opposite to those desired by Simpson. Under § 401(a)(1), a state must deny certification outright if the proposed activity does not comply with § 303 of the Act.[7] Section 303, in turn, expressly provides that a state water quality standard "shall consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (emphasis added).

Thus, if an applicant's discharge would violate *either* the non-quantitative designated uses *or* the quantitative criteria, the state must deny certification. If, as suggested by Simpson, Vermont was precluded from imposing conditions to assure compliance with its Standards, Vermont would have no choice but to deny certification under § 401(a)(1) and thereby preclude the FERC from issuing a

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[7] Simpson does not contend that Vermont's consideration of aesthetics and recreation stems from any state law other than Vermont's Water Quality Standards. Simpson concedes that Vermont's Standards were approved by the E.P.A. pursuant to § 303 of the Act and conform to the format imposed by EPA's regulations. Petition at 24.

license.[8] Surely a license with conditions serves Simpson's interest better than no license at all.

Simpson argues that, as a matter of law, compliance with the numerical criteria constitutes full compliance with any non-quantitative designated uses. Again, Simpson's argument finds no support in the Clean Water Act, which indicates merely that criteria are "based upon" designated uses, 33 U.S.C. § 1313(c)(2)(A), *not* that compliance with the criteria necessarily guarantees compliance with those uses. Indeed, EPA's regulations specifically require that dams be operated to attain designated uses, 40 C.F.R. § 131.10(g)(4) (1991), and provide that "[w]hen criteria are met, water quality will *generally* protect the designated use," 40 C.F.R. § 131.3(b) (emphasis added). The EPA thus recognizes that there will be instances where the use remains unprotected notwithstanding compliance with the criteria.

Simpson's argument thus boils down to the assertion that the present case is not one of those instances – *i.e.*, that the challenged spillage condition is not necessary to ensure compliance with Vermont's designated uses. Pet. 25 ("The DEC never proved or even claimed that DO levels affect aesthetics or recreation.") This contention raises no federal issue, but rather concerns only Vermont's interpretation and application of its own Water Quality Standards.[9]

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[8] § 401(a)(1) ("No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.")

[9] Because the CWA expressly preserves the states' right to adopt more stringent requirements than those imposed by

This Court's opinion in *Arkansas v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 1046 (1992), *cited in* Pet. 22-23, is of no assistance to Simpson. In that case Oklahoma challenged a permit for a discharge in Arkansas. Under § 401(a)(1), a state has the right to issue a water quality certificate only if it is the state "in which the discharge originates or will originate." Because the discharge originated in Arkansas, Oklahoma was relegated to § 401(a)(2), which did not require Oklahoma's certification as a prerequisite to permit issuance, but rather required *EPA* to make the applicable decisions about compliance with Oklahoma's water quality standards.[10] These circumstances provide the context for the Court's observation that *"at least insofar as they affect the issuance of a permit in another State,* the Oklahoma standards have a federal character." *Arkansas v. Oklahoma,* 112 S.Ct. at 1059 (emphasis added).

In this case, by contrast, the discharge originates in Vermont,[11] so that section 401(a)(1) applies rather than § 401(a)(2). Under 401(a)(1), the Vermont DEC, not EPA, is charged with the duty of interpreting and applying Vermont's Water Quality Standards. Whether Vermont

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federal law, § 510, there is no basis for this Court to hold that Vermont's standards – either on their face or as interpreted and applied by Vermont – are too stringent.

[10] CWA § 401(a)(2) ("the *licensing or permitting agency* . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.") (emphasis added). In *Arkansas v. Oklahoma,* the "licensing or permitting agency" was EPA itself.

[11] Specifically, the penstock (through which water from above the dam is discharged into the river below the dam) is located in Vermont.

has correctly interpreted its Standards poses no federal issue.

III. THERE IS NO CONFLICT AMONG THE STATE COURTS CONCERNING THE ENFORCEABILITY OF "DESIGNATED USES" UNDER CWA § 401(d).

Simpson asserts that state courts are "divided;" while some have "properly interpreted § 401 to preclude imposition of conditions, or outright denial of a certification, on non-water quality related grounds[,] . . . [t]he Vermont Supreme Court has ruled to the contrary." Pet. 19 (footnote omitted). The Vermont Supreme Court did no such thing. Rather, it upheld application of the aesthetics and recreation provisions of Vermont's *Water Quality* Standards. Pet. 3a.

On the true issue posed by Simpson's petition, none of the cases Simpson cites (nor any others of which respondents are aware) creates a conflict: none rules that § 401(d) conditions must be based only on the quantitative or numerical portion of a state's water quality standards.

Indeed, one of Simpson's cited cases actually undercuts its position. In *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274 (Or.App. 1986), the Court held that § 401(d) conditions must go *beyond* water quality standards and include water-quality-related portions of county land use regulations:

> Many uses of land may affect water quality, even if they do not immediately result in direct discharges to the state's waters . . . If [the

> state] . . . grants petitioners' request for a certificate, it must require, as a condition of that certificate, that petitioners comply with the water-related portions of the Deschutes County land use regulations.

717 P.2d at 1279.[12]

And in a case not cited by Simpson, Maine's highest court rejected the narrow interpretation of "designated uses" advanced by Simpson here:

> Bangor Hydro contends that there is an irrebuttable presumption that waters are "suitable for" their designated uses if they meet the numerical criteria of section 465(4)(B) [of the Maine water quality standards] and that the Board has no charter to inquire whether the designated uses actually exist, or can exist, in a river. We disagree.
>
> . . . We cannot conclude that the designated uses included in section 465 are mere surplusage. The level of detail bespeaks a considered determination of the public interest. This legislative determination would be rendered a nullity if the agency responsible for reviewing compliance could consider only the numerical criteria and

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[12] The court also rejected a claim by conservationists that because hydroelectric development was not specifically included in the state's § 303 designated uses, the state was barred from granting a certificate to a hydroelectric project. *Id.* at 1279-80. The court did not hold or suggest, however, that the state was barred from including § 401(d) conditions designed to protect those designated uses. Certainly if non-quantitative land use regulations are properly within the scope of § 401(d), non-quantitative water quality standards must be as well.

> not whether the designated uses actually were achieved in a particular river.

Bangor Hydro-Electric Co. v. Board of Environmental Protection, 595 A.2d 438, 442 (Me. 1991) (footnote omitted). *Accord, id.* at 442 n.4 ("The statutory statement of purpose suggests the intent to include the narrative criteria as an integral part of the water quality standards that the Board must consider in its review.")[13]

Likewise, none of the other cases cited by Simpson hold or even suggest that non-quantitative water quality standards do not constitute a valid basis for a § 401(d) condition. The two New York cases hold that § 401 does not empower the states to consider matters "unrelated to their water quality standards," but do not hold that non-quantitative portions of state standards are unenforceable. *Power Authority v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726, 730 (1983); *de Rham v. Diamond*, 32 N.Y.2d 34, 295 N.E.2d 763, 768 (1973). Indeed, in a case not cited by Simpson, *Long Lake Energy v. Dept. of Env. Cons.*, 563 N.Y.S.2d 871 (A.D.3 Dept. 1990), a New York court relying on *Williams* and *de Rham* held that enhancement of a fishery and associated aquatic resources is within the purview of the § 401 process.

The Connecticut case (which is currently on appeal) overturned an outright denial of a § 401 certificate, where

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[13] Because the case before the Maine Court involved only a state request for information, the Court did not rule on whether the State could ultimately base a § 401(d) condition on the designated uses. 595 A.2d at 443. Nonetheless, the Court's reasoning strongly suggests that such a condition would be upheld.

the denial was based on aesthetic concerns relating to the *quantity* of water in the river. *Summit Hydropower v. Commissioner of Environmental Protection*, LEXIS 2177, *23, (Conn. Super. July 20, 1992) ("The Commissioner concluded . . . that the viewing of Cargill Falls is a recreational use and that the project would have a detrimental effect on the aesthetic quality of viewing the falls by reducing the water level of the natural river flow."). The court specifically noted that "[t]he Commissioner does not claim that the project will in any way affect the aesthetics of the water itself, namely, how the water looks." *Id. Accord, id.* at *27 ("nor does the Commissioner claim that the proposed project will affect the water quality of the Quinebaug River in any way").

Finally, the Pennsylvania case held that § 401 does not encompass "the impact of physical changes in the river on aquatic resources and the effect of the project on wetlands and fish migration." *Pennsylvania Dept. of Environmental Resources v. City of Harrisburg*, 578 A.2d 563, 567 (Pa.Cmwlth. 1990). The court did not address aesthetics, and certainly did not hold that only numerical water quality criteria are enforceable under § 401(d).[14]

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[14] The Pennsylvania and Connecticut courts suggested that § 401 only applies to a "discharge of a pollutant." *Summit*, LEXIS 2177 at *27; *Pennsylvania DER*, 578 A.2d at 567. As indicated below, this issue is not properly before this court, *see* pp. 19-20, *infra*, so any conflicts among the state courts concerning it have no bearing on the advisability of certiorari here.

IV. CLAIMS NOW RAISED BY SIMPSON WERE NOT ADEQUATELY AND SQUARELY PRESENTED TO THE VERMONT SUPREME COURT

The other arguments raised by Simpson in support of its Petition were not raised before the Vermont Supreme Court. This Court has made it clear that it will only entertain issues that were both raised and adequately and squarely presented before the state courts. *Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988); *Webb v. Webb*, 451 U.S. 493 (1981). "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute . . . was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law."[15] *Webb*, 451 U.S. at 501 (emphasis in original). Vermont law, in turn, requires that an issue be raised and "fairly presented" to be preserved for appellate review. *Lanphere v. Beede*, 141 Vt. 126, 129, 446 A.2d 340, 341 (1986). The respondents enumerate each of these claims and, though each is precluded, offer a brief substantive response to each.

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[15] Rule 14.1 (h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them . . . and such pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears." Simpson utterly failed to comply with its obligations under this rule insofar as the claims addressed in this section are concerned.

A. THE CLEAN WATER ACT

Relying on the statutory definition of the term "discharge" (the key term in § 401(a)(1) that triggers the applicability of the state certification requirement), Simpson suggests that state jurisdiction under § 401(a)(1) is lacking because reduced dissolved oxygen levels attributable to a dam do not constitute a "discharge of a pollutant or pollutants." Pet. 21-23, n. 51, *quoting* CWA § 502 (16). Simpson, however, affirmatively stated to the Vermont courts that it "no longer contend[s] that the State of Vermont has no authority at all to regulate the Gilman Dam through the § 401 process, because the Dam and its 'run-of-river' operation is not a 'discharge' for purposes of state and federal law."[16] Motion to Amend Complaint

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[16] Simpson contended before the Vermont Supreme Court that the provisions enumerated in section 401(a)(1) "plainly relate to objective water quality criteria *and* elimination of water *pollution*." Resp. App. 59a (emphasis added). "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). A dam is unquestionably a man-made alteration of the physical, chemical (e.g. DO) and biological integrity of water, and thus causes "pollution". *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (EPA concedes that dams cause "pollution"). Indeed, Simpson conceded that "Vermont has duly enacted applicable water quality standards and there is no dispute that those standards and the [Clean Water] Act generally are applicable to the Gilman Dam." Resp. App. 60a. By conceding not only the applicability of § 401 to "pollution," but the applicability of Vermont's Water Quality Standards and the Clean Water Act to the Gilman Dam, Resp. App. 59a-60a, Simpson further waived its ability to presently claim otherwise.

(1/4/91) (granted, Jan. 16, 1991). Simpson cannot now raise this issue.

In any event, Simpson's quotation leaves out a key word of the definition: "The term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." § 502(16) (emphasis added). *See* 2A Singer, *Sutherland Statutory Construction* § 47.07, at 152 (1992) ("It has been said 'the word "includes" is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated . . . .' ") (citation omitted).[17]

Simpson also neglects to mention that the FERC's regulations expressly require compliance with the § 401(a)(1) state certification requirement as a prerequisite to issuance of an FERC hydroelectric license. 18 C.F.R. § 4.38(c)(2) (1988).

B. THE FEDERAL POWER ACT

Simpson's petition also claims, for the first time, that "Vermont's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the Federal Power Act (FPA) by implication." Pet. 26-27. Simpson never even cited the Federal Power Act to the Vermont Supreme Court. *See Bankers Life and Casualty*, 486 U.S. at

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[17] *National Wildlife Federation v. Gorsuch, cited in* Pet. 23 n.51, is of no assistance to Simpson because it construes § 402(a)(1) (which applies to "the discharge of any *pollutant*") (emphasis added), not § 401(a)(1) (which applies to "any discharge into the navigable waters").

78. Simpson certainly never asserted that Vermont's Water Quality Standards or the water quality certificate were "repugnant" to the Federal Power Act. 28 U.S.C. § 1257(a). Simpson cannot now, for the first time, raise such issues. *Id; Webb*, 451 U.S. at 496.

In any event, this claim has no merit. There is nothing "impli[ed]" about the requirement for a state water quality certification, the state's power to attach conditions to that certification, or the state's power to adopt and apply water quality requirements stricter than federal law: all are explicit on the face of §§ 401 and 510. It is *Simpson* who would repeal a congressional enactment, by reading into the Clean Water Act limitations that Congress did not create. Indeed, Simpson's argument would contravene not only the letter of the CWA, but also its underlying intent to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).[18]

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[18] None of the Federal Power Act cases cited by Simpson (Pet. 27-28) construe the Clean Water Act, and certainly none provides any basis for disregarding the clear terms of CWA §§ 401 and 510.

Equally misplaced is Simpson's argument (Pet. 28) that FPA § 10(j) limits state authority to impose fish and wildlife conditions. Simpson decided not to challenge the certificate's fish passage condition in the Vermont courts (Pet. 14 n. 31), and, as stated above, never cited any provision of the Federal Power Act to the Vermont Supreme Court. Accordingly, Simpson may not raise that challenge here.

Finally, Simpson erroneously suggests that CWA § 102(b)(6) limits Vermont's authority to include spillage requirements in a § 401(d) certification. Pet. 26 & n. 53. Again, Simpson never cited this provision before the Vermont Court. In any event, § 102(b)(6) applies only to "*storage* for regulation of

Second, Simpson argues that "[s]tate aesthetic or recreational conditions unrelated to water quality could frustrate FERC's role as the exclusive forum for comprehensive licensing of hydroelectric uses of navigable waterways." Pet. 25. But as respondents have shown above, the 210 cfs condition *is* related to water quality.

Finally, noting that Vermont and New Hampshire reached different conclusions concerning the necessity of a spillage condition,[19] Simpson also argues that "[i]n the FPA, Congress vested exclusive licensing authority in a single federal agency in order to avoid such inconsistencies." Pet. 26. This is a non-sequitur. Application of § 401(a)(1) in the boundary waters situation *always* raises the possibility that one state will be stricter than another. This possibility is just as real when both states base their certifications on purely quantitative water quality standards (which Simpson concedes they may do) as when one of them applies a non-quantitative standard. In either

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streamflow." (Emphasis added.) The challenged condition of the DEC certificate requires *spillage*, not storage.

[19] Simpson's characterization suffers from several inaccuracies. First, Vermont's spill condition is not "directly contrary to New Hampshire's § 401 certification that the project is in full compliance with that state's water quality standards." Pet. 25. The Vermont condition was based on *Vermont's* standards, and therefore is in no way contrary to New Hampshire's conclusion that its own standards were met.

Moreover, Simpson's assertion that the Gilman Dam is located entirely in New Hampshire waters (Pet. 26) ignores two other key facts: the "discharge" that gives rise to § 401(a)(1) jurisdiction occurs in Vermont (*see* p. 13, *supra*), and the waters above and below the dam are partly in Vermont. *Vermont v. New Hampshire*, 289 U.S. 593 (1933).

case, the result is clearly dictated by §§ 401(a)(1) and 510: the stricter condition controls. *See Arnold*, 717 P.2d at 1278 n.4 (court distinguishes *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), stating: "In the CWA, Congress has created an independent state role in all federal actions involving discharges into navigable waters; the question is not Congressional preemption but what criteria Congress intended the states to consider in deciding whether to issue certificates of compliance with the act.").

V. CONCLUSION

Simpson's petition for a writ of certiorari should be denied.

Dated: February 16, 1993

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SUPREME COURT

OF THE

STATE OF VERMONT

No. 91-530

GEORGIA-PACIFIC CORPORATION
and SIMPSON PAPER (VERMONT) CO., INC.,
Plaintiffs/Appellants

v.

DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and SIERRA CLUB,
Defendants/Appellees

On Appeal From The Washington Superior Court
No. S473-89 WnC

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii-vii [3a-7a]

SUMMARY DESCRIPTION OF THE CASE AND PROCEEDINGS BELOW ..... 1 [8a]

STATEMENT OF ISSUES ..... 3 [10a]

STATEMENT OF FACTS ..... 4 [11a]

SPECIFIC FACTUAL DETERMINATIONS.....10 [18a]

(A) The 1989 Computer Modeling.....10 [18a]

(B) Frequency Of Necessary High Temperatures.....12 [21a]

(C) Frequency Of Necessary Low River Flows..... 13 [22a]

(D) Simpson Constantly Attempted To Engage DEC In Substantive Analysis Of A Workable Alternative To Continuous Spillage.....14 [23a]

ARGUMENT .....16 [25a]

I. UNDER VERMONT LAW AND PRACTICE THIS APPEAL SHOULD HAVE BEEN REMANDED OR ACCORDED DE NOVO REVIEW.....16 [25a]

(A) De Novo Review Is Provided By Law And Prior Practice..... 16 [25a]

(B) Alternatively, The Trial Court Should Have Remanded This Case To The Agency For Further Proceedings Under Existing Rule 75 Practice.....20 [30a]

II. DE NOVO REVIEW OR REMAND SHOULD HAVE BEEN PROVIDED TO REMEDY CONSTITUTIONAL DEFECTS..... 22 [31a]

(A) Due Process.....22 [31a]

(B) Equal Protection.....25 [35a]

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO REMAND THE CASE TO DEC..... 27 [37a]

IV. EVEN ON "THE RECORD" INFORMALLY CREATED BY DEC, THE CONTINUOUS SPILLAGE REQUIREMENT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND CAPRICIOUS..... 33 [44a]

(A) DEC Was Pre-Disposed To Impose A Spillage Requirement Based On Fundamentally Erroneous Misconceptions About The River And Simpson's Facility..... 38 [50a]

(B) DEC's "DOSIM" Model, Even After Refinement By Simpson's Consultants, Does Not Demonstrate A Water Quality Violation Caused By The Gilman Dam.....41 [54a]

(C) The "DOSIM" Model Itself Does Not Predict The Need For Or Support DEC's Imposition Of A Continuous Spillage Requirement Of 210 cfs From June 1 To October 15..... 44 [56a]

V. 401 CERTIFICATIONS ARE LIMITED SOLELY TO CONSIDERATION OF DEMONSTRABLE WATER QUALITY VIOLATIONS.....46 [58a]

VI. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS WERE CLEARLY ERRONEOUS IN NUMEROUS MATERIAL INSTANCES.....49 [62a]

CONCLUSION .....50 [63a]

TABLE OF AUTHORITIES

CASES

Alexander v. Town of Barton, 152 Vt. 148 (1989)..... 26

In Re Ambassador Insurance Co., 153 Vt. 417 (1989).... 24

Appeal of Stratton Corp., ___ Vt. ___, 2 Vt. Law Week 411 (No. 90-278, 10/11/91)..... 23

Arkansas v. Oklahoma, 60 U.S.L.W. 4176 (Nos. 90-1262, 1266).....17, 49

Arnold Irrigation District v. Department of Env. Quality, 79 Or. App. 136, 717 P.2d 1274 (Or. Ct. of Appeals, 1986)..... 48

Bangor Hydro-Electric Company v. Bd. of Env. Protection, ___ A.2d ___ (Me. Supreme Jud. Ct., 7/30/91)..... 48

Bryant v. Town of Essex, 152 Vt. 29 (1989)..... 24

Burlington Firefighters' Associate v. City of Burlington, 149 Vt. 293 (1988)..... 26

Burroughs v. West Windsor Board of School Directors, 138 Vt. 575 (1980).....22, 24, 31

Burroughs v. West Windsor Board of School Directors, 141 Vt. 234 (1982).....20, 27, 31

Caledonian Record v. DET, 151 Vt. 256 (1989)..... 33

In Re Central Maine Power Co., FERC Reports ¶61,033, at p. 61,172-173 (1990).....48, 49

Chapin Hill Estates, Inc. v. Town of Stowe, 131 Vt. 10 (1972)..... 17

Choquette v. Perrault, 153 Vt. 45 (1989)..... 26

Clark v. Weinberger, 389 F. Supp. 1168 (D.Vt. 1974), *aff'd*, 511 F.2d 1390 (2d Cir. 1975)..... 36

In Re Classification of Airport & Pond Brooks, 142 Vt. 458 (1983) 20

Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 358 (D.Vt. 1975) 22

Conservation Law Foundation v. Burke, et al., Docket No. 1709-90 CnC (Chitt. Super. Ct., April 10, 1991) 27

In Re DeSautels Real Estate, Inc., 142 Vt. 326 (1982) 24

In Re Devoid, 130 Vt. 141 (1972) 34

Fourth Branch Associates v. Department of Environmental Conservation, 550 N.Y.S.2d 769, 146 Misc. 2d 334 (N.Y.Sup.Ct., Albany Co., 1989) 48

Fyles v. Schmidt, 141 Vt. 419 (1982) 17

Gour v. Morse, 652 F. Supp. 1166 (D.Vt. 1987) 22

In Re Handy, 144 Vt. 610 (1984) 34

Langlois v. Department of Unemployment and Training, 149 Vt. 498 (1988) 24

In Re Maple Tree Place, 2 Vt. Law Week 184 (1991) 27, 28, 29, 30, 31

Matter of Long Lake Energy Corp. v. New York State Department of Env. Cons., 164 A.D.2d 396, 563 N.Y.S.2d 871 (3d Dept., App. Div., 1990) 48

Matter of Niagara Mohawk Power Corp. v. New York State Dept. of Env. Cons., Index No. 7218-90 (N.Y.Sup.Ct., Albany Co., April 1, 1991) 48

In Re McShinsky, 153 Vt. 586 (1990) 36

Merrow v. Goldberg, 672 F. Supp. 766, 674 F. Supp. 1130 (D.Vt. 1987) 22

Molesworth v. University of Vermont, 147 Vt. 4 (1986) 18

Myott v. Myott, 149 Vt. 573 (1988) 26

In Re Nash, 151 Vt. 1 (1988) 24

Nollan v. California Coastal Committee, 483 U.S. 825 (1987) 24

In Re Orzel, 145 Vt. 355 (1985) 36

Paquette v. Paquette, 146 Vt. 83 (1985) 22

Perry v. Department of Employment of Training, 147 Vt. 621 (1987) 24

In Re Petition of Burlington Electric Department, 149 Vt. 300 (1988) 35

Petition of Green Mtn. Power Corp., 131 Vt. 284 (1973) 25

In Re Potomac Edison Co., 34 F.E.R.C. ¶ 61 (1986) 33

Robinson v. Via, 821 F.2d 913 (2d Cir. 1987) 22

State Department of Taxes v. Tri-State Ind. Laundries, Inc., 138 Vt. 292 (1980) 34, 36

In Re Tariff Filing of Green Mountain Power, 138 Vt. 213 (1980) 33

The City of Pittsburgh, Order Issuing License, 48 F.E.R.C. ¶ 61 33

Vermont of New Hampshire, 289 U.S. 593 (1933) 5

Vincent v. Vermont State Retirement Boar, 148 Vt. 531 (1987) 18, 25

Whitcomb v. DET, 147 Vt. 525 (1986) 33

In Re Williams Point Yacht Club, Docket No. S213-89 27

CONSTITUTIONS, STATUTES, RULES AND REGULATIONS

United State Constitution, 5th and/or 14th Amendments 3, 22, 25, 26

Vermont Constitution, Chap. I, Arts. 4, 7 and/or 9 25

Clean Water Act, Section 401, 33 U.S.C. §1341(a) ..1, 46

Clean Water Act, 33 U.S.C. §1341(d) 48

40 C.F.R. §131.3(b) 48

3 V.S.A. §801 et seq 18, 34

3 V.S.A. §809 23

3 V.S.A. §814(a) 18

8 V.S.A. §2201 26

10 V.S.A. §1024(a) 2, 20, 25, 26

10 V.S.A. §1099 17

10 V.S.A. §1269 17

Rule 52(a), V.R.Civ.P. 50

Rule 60(b), V.R.Civ.P. 30

Rule 75, V.R.Civ.P. 2, 16, 26, 50

Vermont Water Quality Standards 1, 47

Vermont Water Pollution Control Regulations, Rule 13.11 17

MISCELLANEOUS

1 Koch, *Administrative Law & Practice*, §9.4, at 92 (1985 ed.) 19

1 Koch, *Administrative Law & Practice*, §7.23, at 575-76 23

2 Koch, *Administrative Law & Practice*, §9.2, at 73 & fn. 13 36

SUMMARY DESCRIPTION OF THE CASE AND PROCEEDINGS BELOW

This is an appeal from the Department of Environmental Conservation's ("DEC") issuance of a "Section 401 Certification" for a dam and hydro-electric facility owned and operated by Plaintiffs/Appellants on the Connecticut River at Gilman, Vermont. *See* Printed Case (hereafter "PC") at 8-23. This facility provides electric power for the use of the adjacent paper mill owned and operated by Simpson Paper (Vermont) Co. ("Simpson").[1] The 401 Certification is required by federal law in connection with Simpson's relicensing proceedings for the Gilman dam facility, which are still pending before the Federal Energy regulatory Commission ("FERC"). A 401 Certification must be obtained from any state agency having jurisdiction over a discharge into waters of that state, certifying that applicable state water quality standards will not be violated by the facility.[2] A FERC license incorporating the final 401 Certification is expected to be issued for a minimum term of 40 years.

The only item still in dispute is the condition imposed by DEC in the 401 Certification, requiring that

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[1] Georgia-Pacific Corp. formerly owned the entire mill complex. It has also contracted to sell the hydro-electric facility and dam to Simpson, but the transfer has not yet been formally approved by FERC. G-P remains a nominal party only in this appeal, and hereafter Appellants will be referred to as Simpson, including actions taken by G-P prior to the mill's sale.

[2] *See* §401(a) of the Clean Water Act ("CWA"), 33 U.S.C. §1341(a). Pertinent excerpts from the Vermont Water Quality Standards ("WQS") which were in effect at the time, are included at PC 81-89.

Simpson continuously spill over the dam, instead of allow to pass through the turbines and generate electricity, 210 cubic feet per second ("cfs") of river water from June 1 to October 15 of every year. PC 20. This condition would be effective without regard to actual river flows or water quality levels at any given time. Simpson proposed but DEC rejected a management plan in place of the continuous spillage condition, which would require Simpson to spill stipulated flows over the dam whenever necessary to correct any actual or anticipated water quality violations.

Simpson simultaneously appealed the 401 Certification to the Vermont Water Resources Board, and to the Washington Superior Court under Rule 75, V.R.Civ.P. DEC contested the Board's statutory jurisdiction to hear that appeal; the Board ruled that it did have appellate jurisdiction. DEC appealed that determination to the Washington Superior Court, which reversed and held that the Board did not have jurisdiction over appeals from DEC's issuance of 401 Certifications. That judgment was not appealed. During 1991 the Legislature passed an amendment to the applicable statute which made it clear that the Board did have *de novo* appellate jurisdiction in such instances.[3] Simpson is the only 401 Certification applicant in Vermont who ever has been or will be denied *de novo* appellate review before the Board.

Simpson then pursued this action, which was the alternative appeal under Rule 75. It first moved for a remand to DEC for additional consideration and to take

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[3] *See* 10 V.S.A. §1024(a) (as amended 1991 Leg. session).

additional evidence, and/or reconsideration of the trial court's informal ruling that the case would be decided only on the administrative "record" and would not be heard *de novo* by the court. The trial court denied that motion on May 2, 1991, without written opinion or explanation. The parties then briefed and orally argued the merits – principally, Simpson's contention that the continuous spillage requirement was arbitrary and capricious and not supported by substantial evidence – based only on the administrative "record". On October 2, 1991, the court issued a written Opinion and Order, with findings and conclusions, sustaining DEC's 401 Certification in all respects, particularly the continuous spillage condition. *See* PC 24-37. On October 21, 1991, Simpson filed a Motion to Amend and/or Make Additional Findings, which was denied by the court, again without written opinion or explanation, on December 16, 1991. Simpson filed its Notice of Appeal on November 1, 1991. PC1.

STATEMENT OF THE ISSUES

1. Was a remand of the 401 Certification to DEC to take additional evidence and/or for reconsideration, or alternatively a *de novo* hearing on the merits in the Washington Superior Court, required under established Vermont law, recognized principles of administrative law, and/or Rule 75, V.R.Civ.P.?

2. Was a remand of the 401 Certification to DEC for additional evidence and/or reconsideration, or alternatively a *de novo* hearing in Superior Court, required to prevent violations of the 5th ("Due Process" clause) and 14th ("Equal Protection" clause) Amendments to the

United States Constitution, and the Vermont Constitution, Chap. I, Arts 4, 7 and 9 which have occurred in the absence of such further proceedings?

3. If a remand to DEC for additional evidence and/or further consideration was not required as a matter of law for the reasons contended in Questions 1 and 2 above, did the court below nonetheless abuse its discretion in not ordering such a remand given all of the facts and circumstances of the case?

4. Is paragraph 2 of Condition A of the 401 Certification (the 210 cfs continuous spillage requirement from June 1 to October 15 each year) unsupported by substantial evidence in the administrative record?

5. Is paragraph 2 of Condition A of the 401 Certification (the continuous spillage requirement) arbitrary and capricious?

6. If paragraph 2 of Condition A of the 401 Certification cannot be sustained as a necessary water quality restriction, was it beyond DEC's and the trial court's authority under applicable federal law to base such a spillage requirement alternatively on generalized, nonspecific considerations of "aesthetics" and/or "recreation"?

7. Were the trial court's findings of fact and/or conclusions of law, sustaining the 401 Certification in all respects, clearly erroneous?

STATEMENT OF FACTS

The Gilman dam and impoundment on the upper Connecticut River was originally constructed in 1900, and

has been operated since then as a "run of river" project which essentially passes on an instantaneous basis the same volume of water which flows into it. It has been licensed as a hydro-electric facility since 1965, retroactively to January 1, 1941. Electricity generated is used to power the adjacent specialty paper mill now owned by Simpson; that plant produces approximately 70,000 tons of paper each year and employs approximately 180 people in the "upper valley" region of Vermont and New Hampshire. River flows between 130 and 2,850 cfs are routed through the hydro-electric facility; flows under or over those limits are in fact spilled over the dam or through its crestgate. The State of New Hampshire has already issued its Section 401 certificate for the facility which allows Simpson to continue operation of the dam without any spillage requirement, having found that "run of river" operation does not violate any New Hampshire water quality standards.[4]

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[4] The Connecticut River is, of course, located within New Hampshire up to the low-water mark on the Vermont side. *See Vermont v. New Hampshire*, 289 U.S. 593 (1933). The entire dam is itself located in New Hampshire as is the "crestgate" through which spillage mandated by Vermont will pass. The "powerhouse" is partially in Vermont and partially in New Hampshire. The New Hampshire Class B standard for DO is actually higher, or *more stringent*, than the Vermont water quality standard then in effect, requiring 75 percent saturation, whereas the Vermont standard requires only 6 mg/l of DO or 70 percent saturation. PC 88; *cf.* Record on Appeal (hereafter "RA"), State's Exh. I. At 22°C (71.6°F), the critical water temperature used in the computer modeling relied on by DEC, 75 percent DO saturation would be 6.56 mg/l.

Upstream of the Gilman dam are numerous "point sources" of pollution, both municipal and commercial, which operate pursuant to their own state/federal wastewater discharge permits, but which still contribute pollution loading to the river as it enters the Gilman impoundment; included among these is the discharge from the Simpson paper plant itself.[5] There is also pollution from indirect sources such as agricultural runoff and residential wastewater disposal. However, during these Section 401 proceedings DEC agreed that it would assume that all Vermont water quality standards are met above the dam. The most critical of these technical requirements for purposes of this appeal is the level of dissolved oxygen (hereafter "DO"); DO is used up not only by fish and other "aquatic biota" in the river, but also by other identifiable pollutants, such as "biochemical oxygen demand" or "BOD." The Vermont DO standard in the river segment at issue is 6 mg/l or 70% saturation, PC 88; at 22°C, which is the average high river temperature during the summer, the stipulated minimum DO standard is 6.2 mg/l.

River flows exiting the facility's tailrace, as well as those at the foot of the dam whenever there is spillage, were actually measured both before and after the Certification was issued, and have consistently been in excess of 6.2 mg/l DO. There is also a measurable increase in DO levels in the river for the first mile below the dam

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[5] The plant received a five-year renewal of its "NPDES" discharge permit from DEC as of March 15, 1989, only 5 months before the 401 Certification was issued.

during summer months, when that segment is free-flowing, despite the fact that just below the dam Gilman's municipal wastewater – which is treated and subject to its own direct discharge permit – enters the river. At about one mile below the dam the river enters what under typical summer conditions is the uppermost limit of the Moore Reservoir.[6] PC10, ¶6. The river becomes more sedentary and begins to deepen; the Moore Reservoir, which feeds the Moore hydroelectric facility operated by New England Power, is one of, if not the largest impoundment on the river.[7] It is well beyond that point, some 2.4 miles downstream, that computer modeling predicts a slight "sag" or decrease in DO levels during potentially extreme summertime conditions.[8]

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[6] During winter months, the head of the Moore Reservoir ordinarily comes almost to the foot of the Gilman dam. However, it is agreed that a DO violation is unlikely then, despite the absence of a free-flowing downstream river segment, because flows are higher and water temperatures are lower.

[7] Moore Reservoir is approximately 11 miles long, 0.6 miles wide and 30 to 150 feet deep; at "full pool" it has a surface area of 3,490 acres and a reservoir volume of 88.7 billion cubic feet of water. *See* RA, Metcalf & Eddy 1983 Report, at B-3-2. In contrast, the Gilman dam impoundment is approximately 2.9 miles long, 375 feet wide, and 19 to 26 feet deep; it has a gross storage volume of 705 acre/feet, or 30.1 million cubic feet of water, but "negligible" usable storage capacity because the dam is operated as a "run of river" facility. *See* RA, State's Exh. F at A-4. Moore Reservoir is approximately 3,000 times the size of the Gilman impoundment, over five (5) times as deep, and unlike Gilman, actually stores water rather than releasing it "instantaneously."

[8] Because of all the complexities involved, most analysis of water quality is done through computer simulations, although actual sampling – such as that conducted for G-P and Simpson in 1985, 1990 and 1991, respectively – is obviously preferable.

This computer prediction of a small DO "sag" downstream of the Gilman dam is dependent on the simultaneous concurrence of at least four independent variables: maximum wastewater discharges from both the much larger James river paper plant in Groveton, New Hampshire (which eventually enters the Connecticut river upstream of the Gilman impoundment), and the Simpson paper plant itself; low river flows at a level called "7Q10" (the lowest average volume of water which historically one can expect once every ten years over a period of seven days), which was calculated to be 373 cfs: and critically high summertime water temperatures. In addition to the necessary convergence of those four primary factors, DEC staff also hypothesized a negative effect from diurnal "flux caused by algal respiration and photosynthesis." PC 15.[9] Finally, DEC included in its

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[9] The theory of diurnal fluctuation due to stratification and algal activity in Moore Reservoir was emphasized by DEC staff late in the permit application and analysis process, as another justification for DEC to increase its proposed spillage requirement from 185 cfs to 210 cfs. This additional or alternative justification for substantial spillage became necessary because (a) the refined computer model was demonstrating no DO violation of even "sag" in the first 2-plus miles below the dam, and at worst only a smaller decrease in DO of 0.4 mg/l in Moore Reservoir, and (b) DEC staff realized its error in assuming until then that the Gilman mill's discharge entered below the dam. It is evident from the "record" that until June 1989, DEC staff had intended to use spillage over the dam as additional "compensation" for the pollutant loading which they erroneously thought Simpson was adding below the dam. *See* PC 58, 60. That fundamental error was apparently why DEC was originally willing to agree that all WQS standards were met above the dam (where the mill discharge actually enters); by June 1989 it was too late for DEC to retreat from that agreement, so it scrambled to come up with another justification for substantial spillage.

analysis the effect of substandard DO levels **upstream** of and passing through the dam, despite its agreement to assume that DO levels above the dam were in compliance. PC 13-14, 15. By melding together these various elements, DEC staff devised a theoretical "DO violation" of 1.2 mg/l which Simpson would be required to "correct" through continuous spillage over 4½ months. PC 15, 20.

Because it is so demonstrably unlikely that all the necessary variables would converge so as to create an actual downstream DO sag as hypothesized by the computer modeling, Simpson initially proposed instead a "Water Quality Management Program" which would continuously evaluate river conditions from July 15 through September 15 of each year, and automatically spill sufficient water over the dam to prevent any predicted or likely violation of DO standards below the dam. PC 14, 43-44, 47-52, 65-66. DEC staff repeatedly informed Simpson that they were not interested in any such management techniques and would insist instead on a simple, continuous spill requirement. Simpson continued to offer to revise and expand the plan to meet specific technical concerns, but was met only with DEC's "historic resistance" to all such proposals. PC 48. Simpson nonetheless formally prepared a final revised management plan for submission to FERC; it was also provided to DEC in August 1989, just after DEC had issued the Section 401 Certification because of a one-year processing deadline.

Although G-P's formal August 1989 submission is not part of DEC's formal "record,"[10] Simpson's proposal for such a plan was clearly and continuously discussed with and rejected by DEC. Also not included in the administrative "record" are (1) a January 1990 "Report on Additional Water Quality Modeling Study" which was submitted to refine the June 1989 computer modeling analysis by (a) determining a more modern and accurate 7Q10 flow volume, at 400 cfs rather than 373 cfs, and (b) dividing the relevant portion of the River into five primary study "reaches," both above and below the dam; (2) a December 1990 Water Quality Monitoring Study, which updated and verified the actual sampling data last taken in 1985, between August 15 and September 19, 1990,[11] and (3) a November 1991 letter with "Results of Summer 1991 Water Quality Monitoring" conducted over 48 hours from July 22 to July 24, 1991.[12] PC 77-78. This last effort to

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[10] The State ostensibly contends that "the record" should include no materials or information after July 28, 1989, but has no compunction against relying on such materials when that suits its purpose. *See* text *infra*, at 32-33. In any event the administrative "record" when the agency proceedings are informal, as here, cannot be so rigidly controlled. *See* Point I(A), *infra* at 18-19.

[11] Average flow volume during the period was 1,892 cfs, well in excess of the critical 7Q10 flow of 373 cfs. At the point 2.4 miles downstream in Moore Reservoir where the computer-predicted DO "sag" might occur, the lowest actual DO measurement was 7.8 mg/l (90.9 percent saturation) at a temperature of 21,86°C.

[12] This sampling occurred when river flows ranged between 500 and 550 cfs, conditions near the crucial 7Q10 flow of 373 cfs. At the critical Moore Reservoir sampling point, at temperatures exceeding 25°C (22°C was the input parameter in

obtain actual DO sampling data at river conditions approaching (and even exceeding) the critical parameters used in the 1989 computer projections, could not have occurred any sooner than July 1991 because the necessary "low flow" conditions were simply never experienced throughout the permitting process until July 1991.

SPECIFIC FACTUAL DETERMINATIONS

While the foregoing Statement of Facts provides an overview of this appeal sufficient for the Court's review of Issues 1-3, there are some additional and detailed facts which are necessary for consideration of Issues 4-7 relating to the merits of the 401 Certification and whether its key findings and conclusions are supported by substantial evidence and not arbitrary or capricious.[13]

(A) The 1989 Computer Modeling

There is no dispute that in June 1989, late in the one-year review process allowed for 401 Certifications, Simpson and DEC finally agreed on a computer model to stimulate DO conditions below the Gilman dam. It is this theoretical modeling analysis that is the linchpin of DEC's continual spillage requirement, and while there is

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the 1989 computer projection), DO was never less than 7.55 mg/l, well above the Vermont DO standard.

[13] As below, by proceeding to this next level of "on the record" analysis, Simpson in no way intends to waive its arguments that this type of review in this particular case was and is inappropriate and a denial of Simpson's substantive and procedural rights.

no real disagreement on what it shows, there is strong argument on what it means.

The final revised "DOSIM" model runs prepared for Simpson, with input variables apparently agreeable to DEC,[14] showed that (a) under possible 7Q10 (i.e., 373 cfs) river flow conditions, (b) at summertime river temperatures of 22°C (71.6°F), and (c) with *all* upstream point source discharges at maximum permitted levels, downstream of the Gilman dam there could theoretically be a "sag" or temporary decline in DO levels from 6.3 mg/l to 6.1 mg.; before recovering to 6.4 mg/l, at distances below the dam of 1.5 to 2.4 to 3.5 miles respectively. PC 69-76. In other words, if *all* of those conditions occurred simultaneously, the refined "DOSIM" model predicted that for a stretch of approximately 0.4 of a mile – at a location more than two miles downstream of the dam – there could be a *de minimis* violation of Vermont water quality

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[14] Simpson's engineering consultants considered DEC's "DOSIM" computer program to be more simplistic and less reliable than another, newer program available. However, because DEC could only run "DOSIM" and was insistent on its use, Simpson relented. Apart from DEC's mistaken assumption about location of the Simpson mill's direct discharge, *see* fn. 9, *supra*, the consultants also refined the "DOSIM" model in June 1989 in several other significant ways: the assumed river temperature was changed to 22°C, the number of study reaches below the Gilman dam was increased from one to three, the river velocities in each of those stretches was adjusted, and certain pollutant decay rates were changed to more accurately reflect "standard engineering practices." *See* RA, July 1989 KA Study, at 7-11.

DO standards (0.1 mg/l if the standard is 6.2 mg/l).[15] *Id.* This potential "sag" in DO levels downstream of the Gilman dam was acknowledged to be no more than 0.4 mg/l of DO before recovery, PC 67, and any part of this theoretical DO "sag" which does occur would be well within the summertime limits of the downstream Moore Reservoir.[16]

There is no predicted violation of the DO standard, or even "sag" in existing DO levels, at any point in the 1.5 mile "riverine" and "transitional" sections of the River below the dam, under all adverse conditions as premised above, and in fact there is a predicted increase in DO of 0.1 mg/l. PC 76. Admitting for the moment that this computer prediction is an accurate prediction of what would actually happen in the river under stipulated critical conditions – a colossally incorrect assumption, as later *sampling* data has shown, *see* Point III *infra*, at 30-31 – still one searches in vain throughout "the record," the 401

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[15] Actually, the DO standard at 22°C would be 6.12 mg/l, but because the "DOSIM" model is less accurate, and to be conservative, Simpson agreed that the standard could be rounded off to 6.2 mg/l. *See* RA, July 1989 KA Study, pg. 7, ¶4.

[16] As finally run, the "DOSIM" model (*see* PC 76) had three study reaches below the Gilman dam: The first 1.0 mile, which would be "riverine" in nature and allow for some natural reaeration over shallow rapids and/or riffles; a "transitional" reach of 0.5 mile at the presumed entrance to Moore Reservoir; and the final 2.0 miles which are well within Moore Reservoir both in vertical profile and hydraulically. *See* RA, State's Exh. 1, fig. 1. "Run E" (PC 76) must be read in reverse; mile 3.4 under "Distance" is the base of the dam, while mile 0.0 is 3.5 miles downstream in Moore Reservoir. The hypothetical "sag" would be at miles 1.3-1.1.

Certification itself, or even the trial court's findings, for any remotely rational or scientific explanation and analysis of how this DO "sag" is in Moore Reservoir actually *caused* by lack of spillage at the Gilman dam, rather than the effect of Moore Reservoir on pollutants added upstream and downstream of the dam.

(B) Frequency Of Necessary High Temperatures

The seven-day average summer high water temperature in the Connecticut River at the project site, which was assumed for all the computer modeling runs in June 1989, is 22°C (71.5°F), based on daily temperature readings from January 1979 to April 1989 (except June 1984 to August 10, 1985). Seven-day average river temperatures in excess of 21.1°C (70°F) have typically occurred for approximately a four-week period, from July 10 to August 6 of each year. Seven-day average river temperatures exceeded 65°F for approximately a seven-week period, from July 7 to August 27 of each year. The highest absolute temperature recorded during the period was 26.4°C (79.5°F), from July 30 to August 3, the highest seven-day average river temperature was 21.9°C (71.4°F) for July 10 to July 17. *See* RA, July 1989 KA Report, at 2 and Fig. 1. No violation of Vermont's DO water quality standard is likely to occur when river temperatures are 65°F or lower. *Id.*

It is thus beyond any argument that even "the record" before DEC showed that, at worst, the high river temperatures necessary, by definition, to trigger the modeled computer result could only occur during a seven to eight week period in July and August. Notwithstanding,

DEC imposed a continuous spillage requirement from June 1 to October 15, 4½ months of every year.

(C) Frequency Of Necessary Low River Flows

River flows of approximately 375 cfs (the 7Q10 flow was assumed to be 370 cfs for the "DOSIM" model runs; New Hampshire had actually calculated 7Q10 to be 373 cfs) are exceeded approximately 96-97% of the time over the entire period of record (1941-1982) at the nearest USGS gauge. *See* RA, State's Exh. F, at A-3 and Fig. A-1. In other words, the flow conditions needed to produce the model result will statistically occur only 3-4% of the time. Put differently, no violation of the Vermont DO water quality standard is likely to occur, even downstream in Moore Reservoir, at flows equal to or exceeding 800 cfs,[17] PC 12-13, but during the months of July, August and September – which encompass the period of highest river temperatures – flows of 800 cfs are exceeded 80%,

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[17] At flows of 800 cfs, there is also no actual measured DO violation in the impoundment *behind* the Gilman dam. At measurement Station 4, just above the dam crest, the lowest measured DO level, at a depth of 25 feet, was 6.25 mg/l at 70.7°F. *See* RA, Aquatec Date Report (August 12, 1985, 8:45 p.m.). The DO level at Station 4 at depths down to ten feet ranged from 6.3 mg/l (August 12, 1985, 8:45 p.m.) to 8.6 mg/l at one-half foot (August 12, 1985, 8:45 p.m.; August 13, 1985, 8:20 p.m.). The 1991 sampling data, *see* PC 77-78, confirmed there are no DO violations in the Gilman impoundment even at lower flows of 500-550 cfs. This calls into question DEC's essential premise – *see* PC 59-61 – that DO conditions behind the Gilman dam are actually substandard (even though it purported to agree DO standards were met behind the dam).

70% and 70% of the time respectively. *Id.*, Exh. I, at 4 and Fig. 4-6.

Based on "the record" evidence alone – once the focus is limited to July and August when high enough water temperatures might occur – it is again beyond any genuine dispute that low flow conditions below the State's admitted safety threshold (800 cfs) are likely to occur at worst 30% of the time. Over a 62 day period, that results in an admittedly mathematical average of 18.6 days in which the modelled result *might* occur.[18] While Simpson understands the need to be more conservative than the mathematical average, that hardly justifies an exponential increase to 138 days of continuous spillage regardless of actual river conditions.

(D) Simpson Constantly Attempted to Engage DEC In Substantive Analysis Of A Workable Alternative To Continuous Spillage

Since late 1986, when required informal discussion began for this certification process with DEC, Simpson has proposed some form of water quality monitoring and intermittent dam spillage to ameliorate any downstream DO violations which might occur under modeled conditions – even though those effects, if any, occur well into Moore Reservoir and there is no scientific proof they are actually caused by the Gilman dam's traditional "run of river" operation. *See* PC 14, 43-44, 47-52, 65-66. Simpson

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[18] Of course, it is arguable that the real incidence is only 3-4% of 62 days, or a potential 2.5 days, since that is the statistical occurrence, on this record, of 7Q10 low flows.

was well aware from the outset that DEC had already determined to impose a spillage requirement to aid in general re-aeration of the river, if it could come up with any arguable basis to do so.[19] *See* PC 40, and Point IV(A), *infra* at 38-41. Thus by January 1987 Simpson had proposed to spill 100 cfs of water over the dame at any time between July 15 and September 15 that (a) flows were 500 cfs or less, and (b) background DO levels were 6.2 mg/1 or less. PC 50-52.

DEC's response was curt: "Tom [Willard] indicated that the Department has historically resisted management of the resource on such a frequent basis." PC 48. In fact, almost all direct discharge (i.e., wastewater treatment) permits have conditions requiring daily measurement and monthly reporting of various water pollutants; the required technology is-well-established and familiar to DEC. Essentially the same proposal was still on the table in April 1987. Simpson's monitoring/spillage proposal was reiterated in substance in May 1989; at that time the proposal was not limited to any particular combination of background flows, spillage (although the proposed quantity was in fact increased to 130 cfs) or DO levels, but simply whatever "spillage may be necessary to maintain water quality standards for dissolved oxygen." That generic proposal was repeated again on July 24, 1989. *See* RA, State's Exh. L. DEC never abandoned its "historic resistance" to any management and monitoring plan

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[19] The "record" totally refutes the trial court's conclusion that Simpson did not propose an alternative management plan until it "realized that DEC was serious" in June 1989 about imposing continuous spillage.

regardless of the specific details of the proposal. Simpson never made the "formal" or "specific" proposal that DEC and the trial court concluded should have been offered, because the specific details were wholly irrelevant to DEC inasmuch as it unilaterally rejected the entire concept.[20]

ARGUMENT

I. UNDER VERMONT LAW AND PRACTICE THIS APPEAL SHOULD HAVE BEEN REMANDED OR ACCORDED DE NOVO REVIEW

(A) De Novo Review Is Provided By Law And Prior Practice

Rule 75, V.R.Civ.P., under which this action was brought, does not itself provide for the type of standard of review in a particular case; that determination is to be made in light of all the circumstances in a given action. The original Reporter's Notes state: "Rule 75(d) leaves to specific statute or prior practice the questions whether review in a given case is de novo. . . . " Since there is no "specific statute" applicable here – in fact it was the Legislature's failure to provide for a specific route of appeal from issuance of a Section 401 Certification,

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[20] DEC's final memo on the Certification prior to issuance noted concerns abut enforceability of any management plan made a condition to a 401 Certification. PC90. Putting aside the utter cynicism of such a stance, that logic would apply as well to the spillage condition it *did* impose. This concern was and clearly is make-weight.

thereby requiring resort to Rule 75, that creates the primary procedural dilemma here – one must look to "prior practice."

One element of relevant prior practice is that until the State raised its jurisdictional objections in the companion case, all appeals of 401 Certifications were heard *de novo* by the Water Resources Board. Equally telling is that every other water quality permit or license issued by DEC was then and still is subject to *de novo* review by the Board. *See* 10 V.S.A. §§1024, 1099 and 1269. Inasmuch as issuance of a Section 401 Certification must be limited to water quality issues,[21] *see Arkansas v. Oklahoma,* 60 U.S.L.W. 4176, 4181 (Nos. 90-1262, 1266) (Feb. 26, 1992) and Point V, *infra* at 46-49, relevant Vermont practice indicates that *de novo* review is not only appropriate but necessary.

Chapin Hill Estates, Inc. v. Town of Stowe, 131 Vt. 10 (1972), supports a *de novo* appeal in this instance. In *Chapin Hill* the taxpayer had no specific statutory route of appeal from a town's decision denying a request to abate property taxes, so this Court held that a Rule 75 action was appropriate. The Court also stated that the town's decision was reviewable "in the nature of *certiorari," id.* at 13, even though it is unlikely that the town's determination was made on anything close to a quasi-judicial basis. Finally, because the "record" before the trial court was

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[21] DEC's own regulations provide from processing of 401 Certifications as if they were applications for a discharge permit under Chapter 47 of Title 10. *See* Vermont Water Pollution Control Regulations, Rule 13.11, 5 *Code of Vermont Rules,* pg. 12033002.

inadequate and lacked at least one essential fact, the Court held that "review in the nature of *certiorari* may not be limited only to the facts as found in the record. Furthermore, the reviewing court is not precluded from taking testimony." *Id. See also Pyles v. Schmidt,* 141 Vt. 419 (1982) (trial court apparently took evidence and made findings in Rule 75 appeal).

The decision in *Chapin Hill* has never been overturned or critically distinguished in the ensuing 20 years. Nonetheless, more recent decisions speak of cases under Rule 75 as actions "which are in the nature of certiorari and which do not contemplate de novo review . . . [but are] confined to addressing substantial questions of law affecting the merits of the case." *Molesworth v. University of Vermont,* 147 Vt. 4, 6-7 (1986). *Chapin Hill* is not discussed or even cited in *Molesworth,* and there is no mention in the latter case whether there was any deficiency in the "record" or any disputed questions of fact. The legislature had clearly delegated tuition residency decisions to the University, and there was no similar practice – unlike here where *de novo* appeal was before and is now available of all other water quality permits, including 401 Certifications – which would compel a different procedure. Finally, the plaintiff in *Molesworth* did have an intermediate right to present evidence and develop an adequate record at that stage.[22]

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[22] *Vincent v. Vermont State Retirement Board,* 148 Vt. 531 (1987), appears to be uninstructive. There was no material disagreement as to any of the facts; the essential dispute was a question of law only. In any event the Retirement Board is given the authority to create administrative rules pursuant to 3 V.S.A. §801 et. seq., which provide for "contested case" procedures

Moreover, any rational view of orderly administrative procedures must hold that the failure to provide Simpson a "contested case" type proceeding before DEC,[23] removes any justification for subsequent appellate review solely "on the record" and under a "substantial evidence/arbitrary and capricious" standard. Professor Koch in his treatise states that this traditional rule of deference to administrative proceedings typically "exists when the [agency] decision was made through a formal, trial-like proceeding." 1 Koch, *Administrative Law & Practice*, 9.4, at 92 (1985 ed.) (fn. omitted). He continues: "the substantial evidence standard [applies] where an administrative decision must be made through trial-type procedures . . . , i.e., formal adjudication." *Id.*

However, when informal adjudication procedures are followed by the agency, as here, "the record may not be sufficient for judicial review" and in these limited circumstances the court may take additional evidence to test the agency's findings and conclusions.[24] *Id.*, §8.23, at 30 (1990

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and thus provide benefit applicants with a fair opportunity to present evidence and develop a formal record for later review.

[23] Appellants are and were clearly entitled to a formal hearing on their application. *See* 3 V.S.A. §814 (a) and Point II (A), *infra* at 22-25. However, Simpson was caught in the catch 22 of believing that it would get its opportunity for a "contested case," if one became necessary, at the Water Resources Board – just like every other 401 applicant before and after. Thus there was no need to raise that complaint at the DEC level. Once relegated to Rule 75 review, Simpson has made this claim at every opportunity.

[24] "Under [de novo] review the administrative record becomes an object of attack along with the relevant final decision. The challenger, like any other plaintiff, must show by a

Supp.) (cits omitted); §9.3 (1985 ed. & 1990 Supp.). The trial court should have done so here, not only because of the highly probative additional evidence that has become available, *see* PC 77-78, and because DEC arbitrarily refused to consider a management plan alternative to continuous spillage, but also because the "record" is simply too informal and too amorphous to support any reasoned and objective review of the agency's final decision.

Past and present practice with regard to appeals of Section 401 certificates; the established practice of *de novo* review of all other water quality permits; any principled view of fair and orderly administrative procedure; and the demonstrated deficiencies in the informal "record," all argue in favor of *de novo* review in this instance. Simpson should be provided the opportunity – which it has never had – to demonstrate at a "fair hearing" with all available evidence, that its proposed method of operation of the dam (including Simpson's proposed summertime water quality management program) entitles it to an unrestricted 401 Certification. At such a hearing Simpson would bear the ultimate burdens of proof and persuasion that continued "run of river" operation (as modified) of the Gilman facility, does not and will not result in any degradation of existing water quality or violate any water quality standards. The trial court's order should be reversed and the case remanded for that purpose.

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preponderance of the evidence in the judicial record that the agency decision is wrong. In doing so, the challenger may introduce into the judicial record other evidence or request new or different inferences from the administrative record." *Id.* §9.3, at 88 (1985 ed.) (fn. omitted).

(B) Alternatively, The Trial Should Have Remanded This Case To The Agency For Further Proceedings[25] Under Existing Rule 75 Practice

Burroughs v. West Windson Board of School Directors, 141 Vt. 234, 237 (1982), establishes that even though a court under Rule 75 may have "jurisdiction in the nature of an appellate court only," *id.*, if in the case there are "factual issues requiring a hearing" then the court must remand the case to the originating governmental entity to hold such a hearing or at least resolve the factual disputes. *Id.*[26] Simpson has identified several substantial areas where there is a dispute over material facts: Is the theoretical DO "sag" problem in Moore Reservoir actually caused by the Gilman dam and hydro-electric works? Has the State in fact acted on the erroneous assumption that the Gilman paper plant's wastewater discharge enters the river below rather than above the dam? *See* PC 13-14, 15. Did DEC in its actual analysis renege on its agreement to assume that all water quality standards were met at the dam, and base its continuous spill condition at least in part on a contrary finding? *Id.* Does the

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[25] The scope of those further proceedings has changed during the time this case was pending below. In Simpson's view, the 1991 changes to 10 V.S.A. §1024 (a), providing that any action of the agency with respect to 401 Certifications is appealable *de novo* to the Board, makes it no longer necessary to hold a "contested case" hearing before DEC because the proper remedy is now provided by the statutory right of appeal.

[26] *See also In Re Classification of Airport & Pond Brooks*, 142 Vt. 458 (1983) (remand for correction of signature errors); *In Re Williams Point Yacht Club*, Docket No. S213-89 CnC (April 18, 1990) (remand for reconsideration of public trust issues).

additional water sampling data obtained in 1990 and 1991 support the computer model's theoretical DO "sag" prediction? What exactly are the necessary "details" of the water quality management program which Simpson proposed as an alternative to continuous spillage for 4½ months, which DEC has asserted were lacking? None of these questions can even be addressed, let alone resolved on any objective basis, on the administrative "record" presently offered by the State.

Remand of this case to DEC for further consideration of these issues and supplementation of the record, will serve the ends of justice by assuring that the matter can be determined on all the best evidence available. These proceedings may well be Simpson's only opportunity to adjudicate substantially restrictive permit conditions which will be imposed in connection with a FERC license lasting at least 40 years. Moreover, the evidence excluded from the informal administrative "record" indicates that there is no reasonable likelihood of water quality degradation from "run of river" operation even without continuous summertime spillage, and thus there is no real danger of prejudice if such a remand is granted.

II. DE NOVO REVIEW OR REMAND SHOULD HAVE BEEN PROVIDED TO REMEDY CONSTITUTIONAL DEFECTS

(A) Due Process

Simpson has a substantial property right in the present mode of operation of the dam and hydro-electric works as a "run of river" facility without imposition of a summertime (actually 4½ months) continuous spill

requirement. It has been operated as such for the past 50 years, and Simpson has invested significant funds in the facility. But for the intervention of Section 401 and its requirement that a state water quality certificate be obtained, Simpson would have the right, as a riparian user under common law, to continue the present operation of the dam subject only to FERC relicensing. *Cf. Gour v. Morse,* 652 F.Supp. 1166 (D.Vt. 1987) (day care operator's fundamental property right in continued operation).[27]

Moreover, imposition of the State's continuous spill condition increases significantly the cost of operation for the adjacent paper mill, which must then purchase commercial power to replace the hydro-electric power unnecessarily lost because of the arbitrary spillage requirement. The re-issued FERC license now sought will last at least 40 years, hence it is imperative that the 401 Certification, which imposes conditions more restrictive than necessary

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[27] *See also Burroughs v. West Windsor Board of School Directors,* 138 Vt. 575, 578 (1980). The existence of a protected property right in flexible and may depend on established relationships, prior practice and existing understandings. State law determines whether a property or other fundamental right exists, while federal law provides the procedural protections which must be made available under the due process clause of the 14th Amendment to the U.S. Constitution. *See Robinson v. Via,* 821 F.2d 913 (2d Cir. 1987). Other property or fundamental rights which have been recognized include electric service. *Condosta v. Vermont Electric Cooperative, Inc.,* 400 F.Supp. 358, 365 (D.Vt. 1975); parental custody, *Paquette v. Paquette,* 146 Vt. 83 (1985); and entitlement to educational credits or degrees already earned, *Merrow v. Goldberg,* 672 F.Supp. 766 (1986), 674 F.Supp. 1130 (D.Vt. 1987).

to protect water quality, be given the closest scrutiny. Vermont law is clear that, at some stage, Simpson should have been and must be provided with a trial-type, formal adjudicative hearing which would include at the very least "an effective opportunity to defend by confronting any adverse witnesses" or evidence, and to rebut any other information relied on by the agency,[28] a complete and formal record of the proceedings adequate for subsequent review or appeal; an impartial decision-maker,[29] and a clearly-stated effective right to further administrative and/or judicial review. 1 Koch, *Administrative Law & Practice*, §7.23, at 575-76 (fns. omitted). Simpson has enjoyed none of those basic procedural safeguards. *See* 3 V.S.A. §809; *Appeal of Stratton Corp.*, ___ Vt. ___, 2 Vt. Law Week 411, 412-413 (No. 90-278, 10/11/91) ("an adjudication based on the particular facts concerning specific

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[28] Only after-the-fact, in preparing for the case below and reviewing the materials designated by the State as "the record," did Simpson discover that DEC had obtained and apparently relied on a mass of Connecticut River data unilaterally retrieved from an EPA "Storet" computer. *See* RA, Cueto Aff., ¶4 (3/18/91). Simpson never received any notice of this data retrieval or any notice of what use DEC intended to make of it, and thus no opportunity at all to rebut it or any inferences drawn by DEC staff. This episode is simply illustrative of the procedural infirmities which infected this informal permitting process, in violation of Simpson's substantial rights.

[29] While it may be acceptable for a "contested case" type proceeding to be presided over by an agency employee who has been designated by the agency as an "independent" hearing officer, even that fiction was not followed here. The 401 Certification was clearly prepared by the DEC staff which was acting as witness, judge and jury simultaneously; the Commissioner's signature was nothing more than a rubber stamp. *See* PC 90.

parties . . . triggers procedural due process concerns [and] more formal, trial-type procedures").

Instead, Simpson has been relegated to an informal, *ad hoc* procedure – solely because of the then-uncorrected oversight of the Vermont Legislature in designating DEC as the State's section 401 agent but not providing any route of review, unlike all other water quality permits – which does not even remotely provide even minimal due process, fair hearing and appellate review rights. In stark contrast the State does provide procedural safeguards, the right to a full hearing, and specific appellate review for everything from unemployment compensation benefits, *see Langlois v. Department of Unemployment and Training*, 149 Vt. 498 (1988), to inmate disciplinary hearings, *see In Re Nash*, 151 Vt. 1 (1988); from regulation of insurance company assets, *see In Re Ambassador Insurance Co.*, 153 Vt. 417, 423 (1989), to termination or non-renewal of teacher contracts, *see Burroughs, supra* fn. 26; from a real estate agent's license, *see In Re DeSautels Real Estate, Inc.*, 142 Vt. 326 (1982), to all manner of land use and environmental permits, *see* 10 V.S.A. §§ 6085, 6089(a) (Act 250 permits) and 24 V.S.A. §§ 4471, 4475 (local zoning or planning permits).

Before Simpson's property rights in the present mode of operation of the dam can be abridged or circumscribed as the State seeks, Simpson must be provided at least *one* effective and procedurally adequate opportunity to make its case. Denial of such an opportunity to marshall its evidence and fully explain and support its proposals violates its rights to procedural and substantive due process, and may even result in an unconstitutional taking of Simpson's property for public regulatory purposes. *Cf.*

Nollan v. California Coastal Comm., 483 U.S. 825 (1987); *Bryant v. Town of Essex*, 152 Vt. 29, 38 (1989); *Perry v. Department of Employment and Training*, 147 Vt. 621, 623-24 (1987); *Petition of Green Mtn. Power Corp.*, 131 Vt. 284, 293 (1973). Accordingly, construing Rule 75 in this apparently unique circumstance to provide for *de novo* review, or alternatively for a remand to DEC, not only appears to be consistent with Vermont law and prior practice, it is the only means available to avoid what would otherwise be a substantial violation under both the United States and Vermont Constitutions. *See e.g., Vincent v. Vt. State Ret. Bd., supra*, 148 Vt. at 534 fn. 2 (Chap. I, Art. 4 of Vermont Constitution construed to provide judicial review of administrative decisions).

(B) Equal Protection

With the passage during the 1991 legislative session of H.353,[30] *de novo* review of all 401 Certifications by the Water Resources Board, with all necessary APA trappings – including a trial-type hearing, the right to confront witnesses, and an impartial and detached decision-maker – has been confirmed. Simpson has thus become the only Section 401 applicant in Vermont history – past, present or future – who will have been denied the right of and opportunity for review of a 401 Certification with a full and fair hearing under minimal evidentiary and procedural safeguards. While it may be that this system of informal DEC review followed by *de novo* review of 401

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[30] *See* 10 V.S.A. § 1024(a) (as amended).

Certifications need not have been provided,[31] the Legislature has in fact done so for everyone but Simpson. Such clearly disparate treatment has no rational basis and cannot be sustained under either the Vermont Constitution, Chap. I, Arts. 4, 7 and 9, or the 14th Amendment to the United State's Constitution. *See, e.g., Alexander v. Town of Barton*, 152 Vt. 148 (1989). The legislative scheme as now enacted for Section 401 appeals "ensnares" one individual entity, without any identifiable public good or benefit, and without furthering any legitimate public purpose. *See Choquette v. Perrault*, 153 Vt. 45 (1989).[32]

Rule 75, V.R.Civ.P., does not deny Simpson a *de novo* hearing, but leaves that determination to be made under

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[31] However, for the reasons just stated, *some* kind of "contested case" license proceeding is required at some stage because of due process concerns.

[32] The State will likely argue that the Legislature was prohibited from allowing retroactive application of its 1991 curative amendment to 10 V.S.A. § 1024(a). First and foremost, it was the Legislature's initial failure to provide a clear administrative adjudicative system in this instance, that created the problem. Second, legislation can in fact be retroactive if the Legislature so states. *See Burlington Firefighters' Assoc. v. City of Burlington*, 149 Vt. 293, 296 (1988). Third, the pending litigation over the Certification was no reason to deny relief; this was a procedural issue only, and remedial legislation would not have affected *the merits* of whether Simpson is entitled to a 401 Certification without continuous spillage. *See Myott v. Myott*, 149 Vt. 573 (1988). Moreover, the Legislature has acted when the effect *is* potentially to help one litigant over another in pending litigation. *See, e.g.*, 8 V.S.A. § 2201 (as amended 1991). Fourth, this would not have been "special litigation" designed to treat Simpson differently; it would have simply insured that Simpson was treated just like all other Section 401 applicants.

other existing law. Nor does Rule 75 prevent a remand to DEC, for the reasons stated. Given all of the circumstances, *de novo* proceedings in this case, or alternatively a remand to DEC, were required to eliminate an otherwise unequal and unconstitutional burden placed on Simpson alone. The judgment below should be reversed and the case sent back to the trial court in accordance with that principle.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO REMAND THE CASE TO DEC

This case should alternatively have been remanded to DEC, as a matter of the trial court's inherent discretion, to cure evidentiary defects and for DEC to reconsider the entire application. Remands to administrative agencies or tribunals for reconsideration have been granted in a number of cases involving land use and other environmental issues. *See, e.g., In Re Maple Tree Place,* 2 Vt. Law Week 184 (May 17, 1991); *Conservation Law Foundation v. Burke, et al.,* Docket No. 1709-90 CnC (Chitt. Super. Ct., April 10, 1991) (Katz, J.); *In Re Williams Point Yacht Club,* Docket No. S213-89 CnC, (Chitt. Super. Ct., April 18, 1990) (Martin, J.).

As argued previously, the matter can be remanded to DEC, consistent with Rule 75, when it appears there are essential issues that have not been initially decided by the agency, or that "the record" needs to be supplemented with additional evidence to make it complete and provide a thorough basis for the agency's decision. *See In Re Maple Tree Place, supra; Burroughs v. West Windsor Bd. of School Dirs., supra.,* 141 Vt. at 237. *Maple Tree Place* squarely

holds that "trial courts reviewing administrative decisions have the inherent or implied authority to remand the matter to the administrative agency in the interests of justice." 2 Vt. Law Week at 186 (cits omitted). The Court then approvingly quoted the following rationale from the Washington Supreme Court:

> The provision for such a remand would seem to be intended as a safety valve, permitting the reviewing court to require a second look at situations and conditions which might not warrant a reversal, but which, to the court reviewing the record, would indicate to it that the . . . Commission may have acted on incomplete or inadequate information; or may have failed to give *adequate consideration to an alternative route;* or may have weighted its evaluation of the matter under consideration with the *theory of the complete infallibility of its own engineers.*

Id. (cit. omitted) (emphasis added).

Those very concerns are evident here. In *Maple Tree Place* the permit applicant wanted the administrative body to reconsider its plan for phasing of a proposed development; here Simpson contends DEC should at the very least reconsider its arbitrary rejection of the proposed spillage management plan, particularly in light of the additional and previously unavailable 1991 evidence of actual water sampling showing no DO violations under critical conditions. This Court found that the permit applicant should be given the opportunity to make

that request of the administrative body, and so affirmed the remand order. *Id.* 186-187.[33]

Most crucially, there has been no objective, substantive consideration by DEC of Simpson's proposed monitoring and management plan, and whether it would in fact reasonably address any legitimate water quality objectives. *Cf. In Re Maple Tree Place.* Also, there is lacking in "the record" and DEC's explanation and findings any rational analysis of or support for either the magnitude or time-duration of required spillage. Finally, there would be no "prejudice" to the people of Vermont from such a remand, in light of recent actual sampling data. PC 77-78.

The trial court misunderstood Simpson's reliance on *Maple Tree Place* in stating that a remand depends on a party being "misled" at the administrative level. PC 35. Simpson has never contended that it was "misled" about DEC staff's "historic resistance" to any type of management plan; in fact, the complaint is just the opposite – DEC's open hostility to the entire concept made any consideration of any specific or detailed proposal a useless gesture. Thus Simpson was in that sense effectively "prevented from proposing [its] plan" in any meaningful way or with any hope of truly constructive dialogue, because DEC was always intent on spillage no matter

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[33] It is ironic that in *Maple Tree Place,* the major countervailing consideration against a remand was the argument that statutory *de novo* review of planning commission decisions prohibits a remand for reconsideration. The Court found it does not. Of course, no such consideration is present here – it is the failure to provide *de novo* review (or some type of "contested case" proceeding) at any stage that is the problem.

what the actual water quality ramifications.[34] Similarly, Simpson made no "deliberate litigation choice" not to propose a detailed management plan; its initial attempt to do so, as early as January 1987, was rebuffed with the clear message that any further efforts would be a waste of time. Nonetheless, Simpson did continue to offer its proposal and to prepare a more detailed plan, without DEC input, resulting in the formal August 1989 draft.

The trial court's analysis under the standards set out in *Maple Tree Place* appears not to address some of the important factors discussed by this Court. Although the use of remand to an administrative agency as a "safety valve" is briefly mentioned, no extended discussion was provided of Simpson's contention that this case is precisely one of those where the agency "may have failed to give *adequate consideration to an alternative route;* or may have weighted its evaluation . . . with the theory of the complete infallibility of its own engineers." 2 Vt. Law Week at 186 (cit. omitted) (emphasis added).

At bottom the justification for remand under *Maple Tree Place* is the "interests of justice," *id.*, which includes

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[34] DEC staff's assertion that an expensive, time-consuming "intensive assimilative capacity analysis" – generally required only for new *sources* of actual pollution discharges – was required, PC 54, was simply DEC's way of providing some cover for its arbitrary decision not to consider any management plan and instead to require maximum spillage. *Id.* The issues of what magnitude and frequency of spillage is necessary to address actual DO concerns, and what basic monitoring and operational equipment is necessary to accomplish that result, are not rocket science and no complex analysis was or is necessary.

but is not limited to the same considerations which would justify a granting of relief from judgment under Rule 60(b), V.R.Civ.P., *see id.* at 187. One of the well-known grounds for relief in such instances is "newly discovered evidence which by due diligence could not have been discovered . . . " Rule 60(b)(2). Subsequent actual sampling above and below the Gilman dam has confirmed that even at low flow conditions near the critical 7Q10 level, and at temperatures which exceed the critical 22°C level assumed in the predictive model, there is still no DO violation at any relevant sampling point, including the crucial Moore Reservoir, and indeed all readings, except those at the mouth of the Johns River upstream, are well above the DO standard of 6.2 mg/l. *See* PC 77-78.

This actual sampling data was simply unavailable during the period the Certification application was pending before DEC, and no amount of diligence on Simpson's part could have gotten it any sooner because river flow levels are entirely beyond their control and during the past several years have not even approached the critical 7Q10 level until the relative "drought" conditions of the summer of 1991. If nothing else, this data casts considerable doubt on the efficacy of the computer model all parties have relied on until now,[35] as well as DEC's basic

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[35] At flow levels of 525 cfs on July 22, 1991 at 12 noon, and temperatures above 25°C, DO readings ranged from 8.5 mg/l just below the dam, to 8.6 mg/l further downstream at the Gilman Bridge, to 8.1 mg/l at the relevant Moore Reservoir sampling station; at 8:00 p.m., the DO readings there were 9.2, 9.1 and 9.2, respectively. PC 77-78. Defendants are certain to complain that Simpson cannot be heard now to discount the

operating premise that this reach of the Connecticut River is already subject to "severe," "critical" or "substandard" DO conditions. A remand to DEC for reconsideration and re-evaluation is entirely appropriate if not mandated by the essential teachings of *Maple Tree Place* and *Burroughs v. West Windsor Board of School Dirs.*

Finally, the trial court's application of *Maple Tree Place* apparently requires Simpson to prove in advance that a remand to DEC "would serve [some] useful purpose." This requirement does not appear in either *In Re Maple Tree Place* or *Burroughs*. The fact that DEC has not yet been persuaded of the efficacy of Simpson's proposals during "informal discussions" during initial permit processing or while this action has been pending (*see* PC 79-80), is neither surprising nor conclusive. DEC has always had one objective: to require continuous spillage for 4½ months for generalized aesthetic and recreational reasons, and because it mistakenly believed until the last minute that the mill's direct discharge entered below the dam. If, however, a remand were required by this Court because Condition A as it stands is arbitrary and unreasonable, or because such reconsideration is required in

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very computer modeling it prepared and submitted during the application process. The real point is that *computer models* are a poor but sometimes necessary substitute for actual field data, and that adequate sampling data simply was not available then but is now. Summary rejection of clearly relevant evidence that simply was not available before, begs the inevitable question whether this process is ultimately a search for the truth and an honest effort to address any water quality problems that actually exist below the Gilman dam, or is it something else entirely?

the name of fairness and due process, such reconsideration is required in the name of fairness and due process, DEC's willingness to consider a management proposal seriously, and pay it more than lip service, would undoubtedly be greatly enhanced.

Secondly, the trial court's reliance in this regard on FERC's preliminary *Environmental Assessment* in this matter – which the State submitted below – only complicates the issues. *See* PC 35-36. FERC's analysis is ostensibly independent and separate from DEC's determination under Section 401, and obviously occurred well after the "record" in this case is asserted to have closed; it is certainly nothing that DEC relied on in continually rejecting Plaintiffs' voluntary spillage proposals from January 1987 on. To suggest that DEC staff would not give the issue a full and fair reconsideration on remand because FERC staff had purportedly come to its own conclusions, would fly in the fact of ordinary presumptions that matters are not prejudged, even by administrative agencies, until all the evidence is heard. Additionally, as noted below, Simpson has strongly objected to the EA issued by FERC staff and it has yet to be adopted by the Commission itself.

On the other hand, if such emphasis is given to FERC's preliminary comments regarding Simpson's proposed management plan, then FERC's approach to such issues generally becomes fair game. In fact FERC does *not* generally consider such management plans to be "unworkable" or "flawed," and only recently has indicated it will accept, if not impose a quite similar DO monitoring and "as necessary" spillage requirement on

the Central Vermont Public Service hydroelectric project on the Lamoille River at Clarks Falls.[36] *See* RA, Attachment B to Appellants' October 21, 1991 Motion to Amend. It is thus questionable whether the EA prepared by FERC staff in this case is really an independent analysis of the water quality issues, or simply FERC staff's adoption of Vermont DEC's flawed analysis.

IV. EVEN ON "THE RECORD" INFORMALLY CREATED BY DEC, THE CONTINUOUS SPILLAGE REQUIREMENT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND CAPRICIOUS

Simpson disputes that the traditional rule of deference paid to administrative agency determinations, is applicable here because no formal trial-type or "contested case" proceedings were held below. Indeed that defect contaminates the whole case and requires reversal and remand to the trial court to hold *de novo* proceedings, or

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[36] The Lamoille Project's monitoring requirements and "as necessary" spillage condition is not FERC's first or only approval of such management plans. In 1989 FERC licensed 14 separate projects in the Upper Ohio River basin, each with their own similarly crafted monitoring and operational plan "whereby project operation could be rapidly altered to ensure maintenance of a minimum DO concentration" in downstream segments. *See The City of Pittsburgh,* Order Issuing License, 48 FERC ¶61, 362 at pg. 62, 302 (Sept. 27, 1989). *See also In Re Potomac Edison Co.,* 34 FERC ¶61,085 (1986), and Order on Rehearing (June 7, 1991) (licensee simply required to maintain minimum DO level of 5.0 mg/l, through monitoring and whatever means chosen by licensee).

to DEC for further review and reconsideration. *See* Points I-III, *supra.*

The cases generally cited by the State for the contrary proposition – *Caledonian Record v. DET,* 151 Vt. 256 (1989); *In Re Tariff Filing of Green Mountain Power,* 138 Vt. 213 (1980); *Whitcomb v. DET,* 147 Vt. 525 (1986) – all involved appeals on a record created before an independent quasi-judicial board or tribunal (e.g., the Employment Security Board, or the Public Service Board), with established evidentiary and procedural rules and an opportunity to be heard in a careful and deliberate manner. If one traces through the chain of citations found in the Vermont decisions discussing the "scope of review" in administrative appeals, ultimately *every single one* depends on the basic principle of deferential review and presumptive validity established in cases where there was a hearing before and record created by a quasi-judicial board, or at least a "contested case" type proceeding within the agency under the Administrative Procedure Act, 3 V.S.A. §801 *et seq.* ("APA"). *See, e.g., In Re Handy,* 144 Vt. 610 (1984); *In Re Devoid,* 130 Vt. 141 (1972).

State Dept. of Taxes v. Tri-State Ind. Laudries, Inc., 138 Vt. 292 (1980), is an earlier administrative review case that is often cited as the source of the judicial deference/presumptive validity standard. *Tri-State* involved an appeal of a withholding tax deficiency assessment; the appeal to Superior Court followed a "contested case" hearing in the Department of Taxes under the APA. *Id.* at 293, 295. This Court was careful to premise its holding on that fact:

> [W]here the parties have had an opportunity to develop the facts before the agency, the function of the courts is solely to review the contested case on the record established below . . . These [APA] procedures include, *inter alia*, notice of the hearing; opportunity for all parties to present evidence, cross-examine witnesses, and respond on all issues involved according to the rules of evidence normally applied in superior court; and maintenance of a full record of all pleadings, rulings, evidence, exhibits, matters officially noticed, offers of proof, and findings and decisions.

Id. at 295 (cit. omitted). Indeed an actual "transcript" of testimony was produced in *Tri-State*, as is the case in almost all appeals from "contested case" proceedings.

This Court has more recently affirmed that where this fundamental premise for the presumptive validity/judicial deference standard does not exist, the administrative decision is not treated as a Delphic oracle and will be reversed. *See In Re Petition of Burlington Electric Dept.*, 149 Vt. 300, 303 (1988). In that case the Court unequivocally stated that:

> this tenet [the presumptive deference standard] only holds true where the administrative proceedings have provided notice and an opportunity to be heard . . . 'the parties [are] given an adequate opportunity to prepare and respond' to the controlling issues . . . the findings . . . [are] 'based exclusively on the evidence and on matters officially noticed . . . ' [and] there [is] 'full disclosure of the criteria underlying' the order.

Id. at 303 (cits. omitted).

The proceedings below lack all of the essential attributes noted in both *Tri-State* and *BED*. There was no real and meaningful opportunity to be heard and create a formal record for review, especially since the "controlling issues" and "underlying criteria" were constantly shifting, particularly late in the process when the Certification was about to be issued in final form. As even DEC's "record" demonstrates, at the literal eleventh hour – after Simpson's consultants had reworked and refined DEC's "DOSIM" model with reasonably accurate input variables, which then showed *no* downstream DO violations immediately below (i.e., for 1.5 miles) or attributable to the dam, and at worst a D.O. "sag" of only 0.4 mg/l of unknown cause 2.4 miles into Moore Reservoir – "diurnal flux" suddenly became the issue.[37] Simpson attempted to respond informally in the little time left; DEC's response was that it "understood the concept" of why "diurnal flux" should not matter from a regulatory standpoint, but simply "wouldn't accept the argument." *See* RA, July 1989 KA Report, at 13-14 & App. B Tel. Notes (7/19/89).

While Simpson disputes, for all of these reasons, application here of the judicial deference/presumptive validity standard, there can be distilled from some of the

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[37] The State's essential premise on "diurnal flux" is similarly unsupported by any evidence or objective analysis in "the record" or the Certification itself. DEC staff simply "assumes predicted DO analysis would be in the middle of this range [i.e., the computer model results]." RA, July 1989 KA Report, at App. B Tel. Notes (6/21/89). In this way an additional 0.8 mg/l of DO was required to be compensated for, which constitutes 2/3 of the purported "violation." *See* PC 67.

same cases a "standard of review" that is more appropriate to this case if Simpson is, as a last resort, relegated to that type of appellate review. In that event Simpson carries the burden of demonstrating that DEC's Condition A is unsupported by the evidence or is arbitrary or capricious. That burden will have been met by showing that based upon the **entire** "record," with the weight of detracting evidence factored in as well, *see* 2 Koch, *supra*, §9.2, at 73 & fn. 13 (1990 Supp.), there is no fair and reasonable basis for DEC's findings and conclusions on this issue. *Tri-State, supra*, 138 Vt. at 294; *In Re Orzel*, 145 Vt. 355 (1985); *Clark v. Weinberger*, 389 F.Supp. 1168 (D.Vt. 1974), *aff'd*, 511 F.2d 1390 (2d Cir. 1975). In other words, Simpson can show that DEC's Condition A is not supported by "substantial evidence" if it demonstrates continuous spillage for 4½ months is based on evidence which no reasonable person would accept as adequate to support DEC's conclusion. *In Re McShinsky*, 153 Vt. 586, 589 (1990).

When the uncontested evidence in this "Record" is that the theoretical "sag" of 0.4 mg/l in DO levels more than two miles downstream of the Gilman dam is unlikely to occur 70% of the time or better and only in July and August, if at all,[38] and when the evidence is clear that Simpson for more than three years proposed to implement any reasonable monitoring and spillage plan that would correct any actual or anticipated DO deficiency in Moore Reservoir (even though the Gilman dam

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[38] It is conceded by DEC that at flows of 800 cfs or greater, which do occur 70% or more of the time, no DO violation will occur. PC 12-13.

has not been shown to be the cause of that "sag"), imposition of Condition A requiring continuous spillage of 210 cfs every minute for 4½ months is arbitrary, unreasonable, and unsupported by any relevant evidence which a rational, unbiased person would find adequate. As the Certification itself admits: "No-attempt was made to determine the mixed [DO] concentrations necessary at different river discharges in order to assure that the downstream [DO] sag remains above standards." PC 13.

Even if the impact of "diurnal flux" is included, it is still evident that, irrespective of the necessary *amount* of spillage (and that is all that "diurnal flux" adds to the debate; whether a violation could occur at all is still dependent entirely on the "DOSIM" computer prediction), the "continuous" and "June 1 to October 15" aspects of Condition A are wholly irrational, overbroad and lack any fair and reasonable basis in "the record." It is clearly unnecessary in both magnitude of spillage and time of duration to address any predicted DO "sag" in Moore Reservoir – even assuming, which Simpson does not concede, that the theoretical DO "sag" in Moore Reservoir can be traced back to its doorstep at all.

Thus, while the punishment here does not even fit the crime, the "record" fails to demonstrate that a crime has actually occurred or that Simpson is the guilty party. The most telling deficiencies, both analytically and/or factually, are as follows:

(A) DEC Was Pre-Disposed To Impose A Spillage Requirement Based On Fundamentally Erroneous Misconceptions About The River And Simpson's Facility

In 1985 DEC issued to G-P a previous Section 401 Certification in connection with G-P's replacement of one of the four turbine/generator units at the project. In that 1985 Certification DEC stated, in part:

> Due to pollutant loading and reduced re-aeration caused by impounded waters and diversion of flow at dams, there is a critical dissolved oxygen problem in the Connecticut River. . . . the Department will investigate opportunities to increase re-aeration at this site during the relicensing process.

PC 40. As of April 1985, however, the only water quality study actually conducted of the upper Connecticut River indicated only that "*model predictions* show that Class B standards may be violated in a substantial portion of the study area during *critical low flow conditions.*" *See* RA, 1983 Metcalf & Eddy ("M&E") Modeling Study, at 3-1 (emphasis added). Moreover, the same engineers clarified their computer model predictions and conclusions in a subsequent report prepared for these licensing proceedings:

> Modeling results indicated probable water quality standard violations under critical low flow conditions for a substantial portion of the study area. . . . the large DO [dissolved oxygen] sag from about river mile 324 to 312[39] is caused by

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[39] The Gilman dam is downstream, at about river mile 300.

> BOD [biochemical oxygen demand] exertion from the *James River discharge* and by *sediment oxygen demand* through this region.

See RA, 1985 M&E Study, at 2-4 (emphasis added). Clearly it was the reach well *above* the Gilman dam that was the focus of concern.

The James River Corporation paper plant in Groveton, New Hampshire on the Upper Amonoosue River, which empties into the Connecticut River upstream of the Gilman project, has always been known and acknowledged by DEC to be the largest single cause of dissolved oxygen deficiencies in the upper Connecticut River:

> The major affector of water quality in this reach was the James River Corporation paper plant in Groveton, New Hampshire. . . . the dissolved oxygen levels incoming to any given project along this reach are very dependent upon the magnitude of the James River discharge.

PC 45-46. M&E 1983 concluded, however, that actual "dissolved oxygen measurements taken above and below the Georgia-Pacific Dam indicate a decrease [in DO levels] averaging 0.1 mg/l." *Id.*, at 2-22. These measurements were taken with the project in a normal operating mode – i.e., passing all or most flows through the turbines – and demonstrate that any DO deficit actually caused by the Gilman project *in 1983* was "negligible" (an average of only 0.1 mg/l) and certainly not "critical." Intensive actual DO measurements over 48 hours in August 1985, above and below the Gilman Dam, further proved that at flows of approximately 800 cfs, there is *no*

DO deficit caused by the project itself, and certainly not a "critical" one.[40]

The "record" relied on by DEC thus has never supported DEC's 1985 premise that in this specific segment of the Connecticut River applicable to the Gilman project, there is a "*critical* dissolved oxygen problem" due to "reduced re-aeration caused by impounded waters and diversion of flow at dams." PC 40. That incorrect and unsupported premise has never been abandoned by DEC, and from 1985 to the present has compelled DEC to "investigate opportunities to increase re-aeration at this site" – i.e., seek to condition this Section 401 Certification with a continuous spillage requirement – without regard to objective evidence of the Gilman project's actual effect, or lack thereof, on water quality standards. From the outset DEC knew its stance was flawed and accordingly this Certification would be "a major battle" (PC 58) and that Simpson "disputed our findings and may appeal" (PC 90).

Thus, in April 1987, before Simpson had formally submitted its application for 401 Certification, and before either DEC or Simpson's consultants had performed any of the more current computer model analyses of the Gilman project's actual effect on water quality, DEC again confirmed its intention to impose a continuous spillage requirement. PC 54. A year later, which was still before any formal application, a continuous spillage requirement

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[40] Actual DO readings below the dam in 1985 ranged from a low of 6.5 mg/l to a high of 8.05 mg/l at the bridge about 1,800 feet downstream of the dam, and from 7.1 mg/l to 9.45 mg/l even further downstream. *See* RA, State's Exh. I, App. C.

was still uppermost on DEC's agenda. PC 56. The initial draft Certification prepared by DEC in January 1989, well before *any* of the June 1989 computer modeling analyses (upon which DEC now purports to base the permit) had been performed, sought to impose a continuous spillage requirement of 185 cfs. *See* RA. State's Exh. L.

There is no "record" evidence that DEC independently conducted more than one run of its own "DOSIM" computer model analysis of predicted water quality impacts caused by the Gilman dam project, in November 1988. PC 59-64. The only additional computer modeling analysis, which was done in *June 1989,* was actually performed by Simpson's consultants, using modified input parameters dictated by DEC. *See* RA, July 1989 KA Modeling Study, at 7-11, 15-16, and Appendix B. Yet before that final analysis was even undertaken, let alone completed, DEC in January and in May 1989 had already decided to impose a continuous spillage requirement of 185 cfs, *see* RA, State's Exh. L.[41] The compelling conclusion is that since at least 1985 DEC has had the unswerving intention to require significant, continuous spillage at the Gilman dam, come hell or high water.

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[41] The purported "sag" was 1.0 mg/l in the only DOSIM run of record prepared by DEC (11/88) (PC 63), compared to 0.4 mg/l in "Run E" (6/89) (PC 76). Meanwhile, the spillage requirement increased inversely, from 100 cfs to 185 cfs in May 1989, to 210 cfs. in June 1989.

(B) DEC's "DOSIM" Model, Even After Refinement By Simpson's Consultants, Does Not Demonstrate A Water Quality Violation Caused By The Gilman Dam

"Run E" of the "DOSIM" model prepared by Kleinschmidt Associates predicted a theoretical "sag" in DO levels more than two miles downstream of the dam in Moore Reservoir, of approximately 0.4 mg/l, under modeled assumptions for critical low flows, high summer temperatures, and maximum upstream wastewater discharge levels. Nothing more, nothing less. The model simply does not and cannot identify the "cause" of this temporary "sag" in DO levels well into Moore Reservoir,[42] and there is no real analysis in "the record" or discussion in the Certification to the contrary.

The Gilman dam and hydro-electric facility, and its usual "no spill" mode of operation at river flows between 130 cfs and 2,850 cfs when all water passes through the turbines, passes all river flows "instantaneously" and

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[42] The "DOSIM" model also cannot calculate or account for the effect of "diurnal flux" which DEC latched onto late in the permitting process. Nowhere in "the record" is there any mention of "diurnal flux" as a basis for spillage until June 1989. That DEC staff may have latched on to data earlier submitted to buttress their argument, does not show that the State's early DOSIM modeling "accounted for diurnal flux," because the model itself cannot. *See* PC 67. Finally, the State itself has been inconsistent on this point. First it said the January 1989 draft certification included "diurnal flux," when it clearly did not; then it admitted the issue resulted from the discussions and further modeling in June 1989 (which is precisely what Simpson has said all along).

does not have any significant storage capacity.[43] The only actual measurements of DO levels in this segment of the river presently in "the record" – on August 12-14, 1985, at flows of 800 cfs – demonstrate that DO levels for flows downstream of the Gilman dam, before entering Moore Reservoir, generally equal or exceed corresponding DO levels for incoming flows upstream at the head of the Gilman impoundment. Even with "diurnal flux" factored in there is no actual or *measured* violation of the DO standard downstream of the dam at any point before the river enters Moore Reservoir.

Moreover, the hydro-electric facility does not add or "load" *any* pollutants whose effect may be delayed or not become fully apparent until later – unlike, for example, the James River paper mill discharge which is acknowledged to be the "major affector of water quality" over this entire segment of the river. Therefore, any predicted "sag" in D.O. some two-plus miles downstream in the Moore Reservoir cannot be caused by the Gilman dam itself,[44] but must be due to (a) the influence of Moore

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[43] There is in fact spillage at the Gilman dam from time to time even under present operating conditions. The turbine capacity is 2,850 cfs, and any river flows in excess of that – the average mean flow is 2,915 cfs, *see* RA, State's Exh. F, at A-3 – are spilled. Moreover, river flows exceed 2,850 cfs almost 30% of the time during the relevant summertime period. *Id.* at A-12.

[44] The State has hopefully given up its attempt to premise its "liability" finding on the Gilman dam's "destruction" of the "natural re-aeration potential" of the river as if there were no dam. Since the dam was built in 1900, there is obviously *no* objective evidence which could ever be obtained or developed to support such an analysis, and the Certification contains no such justification. (DEC has tried to argue that "the record"

Reservoir, (b) the influence of pollution added by upstream sources, (c) both of those factors, and/or (d) some additional scientific mechanism(s) or variable(s) never identified or discussed by DEC or shown to be Simpson's responsibility.[45]

(C) The "DOSIM" Model Itself Does Not Predict The Need For Or Support DEC's Imposition Of A Continuous Spillage Requirement Of 210 cfs From June 1, To October 15

"Run E" of the State's model simply predicts a theoretical "sag" in dissolved oxygen levels of 0.4 mg/1 under certain assumed adverse conditions, which occurs (if at all) 2.4 miles into Moore Reservoir. Period. Moreover, that modeled result exists only when *all* of the input conditions actually occur, but the model cannot and does not predict the time-frame when those variables might actually occur simultaneously (as they must). There is *no* evidence in "the record" or any discussion in the Certification itself which explains, supports or justifies how and why DEC concluded that spillage must occur *every minute for a period of 4½ months*. Similarly, the *amount of spillage* selected by DEC – 210 cfs – is not and cannot be predicted by the "DOSIM" model. Rather, that aspect of

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[45] Simpson and its consultants *never* agreed the Gilman project causes any DO violation, and they certainly *never* undertook any modeling efforts with the "assumption" that there was a downstream violation for which Simpson is responsible. The State's predictable assertion in that regard, and the trial court's literally incredible finding to that effect, is clearly contradicted by the "record" and every single submittal made by Simpson below.

Condition A is an amalgamation by DEC of (a) the "Run E" model result, (b) DEC's contentions regarding "diurnal flux," and (c) DEC's use of a "re-aeration curve" produced in a 1985 study whose author cautioned was not reliable under all conditions. PC 67.

In formulating its requirement for continuous spillage over the dam of 210 cfs from June 1 to October 15 each year, DEC appears to have relied heavily on "re-aeration curves" contained in the M&E 1985 study. PC 62. Actual re-aeration *potential* over the Gilman dam, however, would be subject to several variables not considered by M&E in producing the Figure 9 curves, which are actually based on only two observed measurements and are otherwise wholly theoretical:

> These curves are mainly based on theory, supported by limited data. . . . It should be noted that *a separate curve* such as those shown in Fig. 9 *is required for each condition of background river flow and dissolved oxygen concentration.*

See RA, M&E 1985 at 18 (emphasis added). The "re-aeration curve" upon which the State so prominently relies for its final determination of the *amount* of necessary spillage, was clearly never intended to bear the weight the State attaches to it.

Moreover, DEC staff appears to have merely "eyeballed" the Fig. 9 chart, and to have committed a significant mathematical error in the process. In a telephone discussion with Simpson's consultants, DEC staff said it had done a "mass balance" analysis to derive the necessary amount of spillage (*see* PC 68). There is no evidence in "the record," nor any discussion in the Certification

itself, of any such "mass balance" analysis performed by DEC to support Condition A. Also, despite DEC staff's statement that the required DO concentration at the base of the dam would have to be 7.4 mg/1 (the 1.2 mg/1 "deficit" (actually, a 0.4 mg/1 DO "sag" plus 0.8 mg/1 "diurnal fluctuation") plus the minimum DO standard of 6.2 mg/1), *see id.*, the final spillage condition was then calculated on the basis of requiring "8.4 mg/1 at the toe of the dam." *See* PC 67. Consequently, DEC's usage of the Fig. 9 re-aeration curve – itself unsupported by sufficient fact or reason – was doubly infected by the wrong input variable – i.e., 8.4 mg/1 of DO instead of 7.4 mg/1.

These are but the most egregious examples of how this 401 Certification, and particularly its continuous spillage requirement, is wholly unsupported even by "the record" informally created by DEC. Any one of these instances of inadequate factual support is fatal to the Certification and Condition A. Of course, overreaching everything is the utter unreasonableness and arbitrariness of a 4-1/2 month continuous spillage requirement, given the demonstrably infrequent occurrence of the necessary conditions for the modelled DO "sag," even if all other findings and conclusions of DEC were to be sustained.

V. 401 CERTIFICATIONS ARE LIMITED SOLELY TO CONSIDERATION OF DEMONSTRABLE WATER QUALITY VIOLATIONS

Section 401 of the Clean Water Act, 33 U.S.C. §1341, is relatively concise in its requirements: Any applicant for a federal license or permit which involves a discharge into

any navigable waters, must obtain from the state regulatory body where the discharge occurs a "certification" that the discharge will not cause any violation of water quality limitations and standards developed in accordance with the Act. *Id.*, §1341 (a) (1). The only substantive provisions of the Act that are expressly referenced, are sections 1311 ("Effluent limitations" and "discharge of any pollutant"), 1312 ("Water quality related effluent limitations"), 1313 ("Water quality standards and implementation plans"), 1316 ("National standards of performance" for the "greatest degree of effluent reduction . . . achievable through . . . the best available demonstrated control technology"), and 1317 ("Toxic and pretreatment effluent standards"). All of these substantive provisions plainly relate to objective water quality issues and elimination of water pollution. Under § 1341(d), any such

> certification . . . shall set forth any effluent limitations and other limitations, and *monitoring requirements*[46] necessary to assure that any applicant . . . will comply with any applicable affluent limitations and other limitations [imposed by states pursuant to §§1311-1317 of the Act]

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[46] DEC's "historic resistance" to monitoring and management of water quality based on that monitoring, is clearly inconsistent even with the plain language of §401. Any §401 condition which includes a monitoring and management plan would be just as effective and just as enforceable as any other §401 condition related to water quality. Moreover, DEC's over-zealous concern with enforcement of and compliance with such a condition, *see* PC 90, exhibits a highly cynical and unreasonable view of the world in general and Simpson in particular.

> and with any other appropriate requirement of State law set forth in such certification.

Id. (emphasis added). Vermont has duly enacted applicable water quality standards. PC 81-89, and there is no dispute that those standards and the Act generally are applicable to the Gilman dam.

The sole issue is whether the Gilman dam during normal operation causes any violation of Vermont water quality standards, and the *only* such standard that has every been put in contention is the DO standard. The Standard requires that DO levels in the river be maintained at all times at a minimum of 6.2 mg/1 (70% saturation at 22°C), or – if existing water quality in the relevant river segment exceeds the minimum – that that existing higher level not be adversely affected by the facility under the so-called "anti-degradation" provisions. *See* Vt. WQS §§1-03, 3-01, PC 86-88. Once the water quality standards are set, the *only* question is whether a particular project complies with those standards or not; as the United States E.P.A. and even the State acknowledges. "[w]hen [water quality] criteria are met, water quality will generally protect the designated use." *See* 40 C.F.R. §131.3(b).

The State's extensive discussion of such things as the Clean Water Act's preamble, the declared Congressional intent, the "remedial" nature of the Act, and "beneficial uses" and "beneficial values," serves no purpose other than to distract the Court from the real issue at hand, which is compliance with the technical DO standard. Courts around the Northeast and elsewhere have now consistently rejected other states' attempts to go beyond

the clear and unambiguous focus of §401 on water quality issues alone. *See e.g., Fourth Branch Associates v. Department of Environmental Conservation,* 550 N.Y.S.2d 769, 146 Misc.2d 334 (N.Y.Sup.Ct., Albany Co., 1989),[47] *Matter of Long Lake Energy Corp. v. New York State Dept. of Env. Cons.,* 164 A.D.2d 396, 563 N.Y.S.2d 871 (3d Dept., App. Div., 1990); *Matter of Niagara Mohawk Power Corp. v. New York State Dept. of Env. Cons.,* Index No. 7218-90 (N.Y.Sup.Ct., Albany Co., April 1, 1991); *Commonwealth of Pennsylvania v. City of Harrisburg,* 133 Pa. Cmwlth. 577, 578 A.2d 563 (Pa. Commonwealth Ct., 1990); *Arnold Irrigation Dist. v. Dept. of Env. Quality,* 79 Or. App. 136, 717 P.2d 1274, 1279 (Or. Ct. of Appeals, 1986); *but cf. Bangor Hydro-Electric Company v. Bd. of Env. Protection,* ___ A.2d ___ (Me. Supreme Jud. Ct., 7/30/91). This development has been noted approvingly by FERC. *See In Re Central Main Power Co.,* FERC Reports ¶61,033, at p. 61, 172-173 (1990). Most importantly, the focus on "primary measures of water quality" in the form of the technical WQS limits, and "an actually detectable or measurable" change in water quality instead of "some theoretical impact" downstream, has been recently confirmed to be the touchstone of Section 401 analysis. *See Arkansas v. Oklahoma, supra,* 60 U.S.L.W. at 4181 (cits. omitted).

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[47] The Court in *Fourth Branch Associates* also specifically held that the reference in §1341(d) to "other appropriate requirements of state laws" merely refers to other water quality standards, separate from those established under the Clean Water Act, which may in fact be stricter. Here Defendants have pointed to no such separate standards, but rely only on the Vermont WQS standard of 6mg/1 D.O. or 70% of saturation.

Accordingly, to the extent both DEC and the court below have alternatively attempted to justify Condition A of the Certification by vague, non-specific references to "aesthetics" and/or "recreation" – *see* PC at 18, 33 – such efforts are inadequate as a matter of law. Moreover, the complete lack of any specific discussion of these characteristics, and how they would or would not be affected by spillage or lack thereof, makes it clear these issues were an after-thought and purely make-weight. For example, when "aesthetics" is an appropriate concern, it is an analysis within the technical standards themselves of the physical attributes of the water itself, *see Arkansas v. Oklahoma, supra,* not some *ad hoc* and subjective consideration of how a cascading dam might look nice to hikers, canoeists, or other tourists.

VI. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS WERE CLEARLY ERRONEOUS IN NUMEROUS MATERIAL INSTANCES

Inasmuch as the trial court did not hold a *de novo* trial or other evidentiary proceeding below, and since the arguably applicable standard of appellate review focuses on whether *the agency's* decision is supported by substantial evidence or is arbitrary and capricious,[48] in a very practical sense the trial court's decision is of little moment and need not be accorded the traditional "clearly erroneous" deference required by Rule 52(a), V.R.Civ.P. Indeed, such a procedure, at least as applied here, would

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[48] Simpson repeats its overriding objection to the application of that principle here, for the reasons previously stated.

only compound the substantial defects which already infect this case. How could any appellant in these circumstances possibly meet the double burden of showing that the trial court's findings and conclusions are "clearly erroneous" if the court below only has to find that the agency's decision is not arbitrary and supported by "some evidence" in the record? The better approach would seem to be that this Court sits just as the trial court did, and using the same standard of review directly examines the agency decision. This Court's administrative review decisions do not suggest otherwise, *see* cases cited *supra* at 33-36, even when the vehicle for review is Rule 75, V.R.Civ.P.

Nonetheless, Simpson has previously set forth some eleven (11) of the most telling areas in which the trial court's findings and conclusions *are* clearly erroneous and not supported by the administrative "record," or are even flatly inconsistent with themselves. *See* Plaintiff's Motion to Amend and/or Make Additional Findings and Conclusions, dated October 21, 1991, in the Record on Appeal. For the sake of brevity those errors and omissions will not be repeated here.

CONCLUSION

For all of the reasons and on any one or more of the grounds stated herein, the judgment below should be reversed and this case remanded to the trial court, either for a *de novo* hearing or for further remand to DEC for reconsideration and further review of the Certification and Condition A. Any such proceedings below must include Simpson's ability to marshall *all* of the relevant

evidence, including that obtained since 1989, and to fairly present its management plan. Alternatively, Condition A requiring continuous spillage should simply be vacated as wholly lacking in evidentiary support, and as arbitrary and capricious, and the Certification otherwise affirmed.

DATED: Burlington, Vermont
March 26, 1992

GRAVEL AND SHEA
Attorneys for Appellants

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Supreme Court, U.S.
FILED
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No. 92-1012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,
Petitioner
v.
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES — Page

Arkansas v. Oklahoma, —— U.S. ——, 112 S. Ct. 1046 (1992) 8

Arnold Irrigation Dist. v. Dep't of Envtl. Quality, 717 P.2d 1274, *review denied*, 726 P.2d 377 (Or. Ct. App. 1986) 7

Bangor Hydro Electric Co. v. Board of Envtl. Protection, 595 A.2d 438 (Me. 1991) 7

Coleman v. Thompson, —— U.S. ——, 111 S. Ct. 2546 (1991) 3

Fourth Branch Assoc. v. Dep't of Envtl. Conservation, 550 N.Y.S.2d 769, 146 Misc.2d 334 (N.Y. Sup. Ct., Albany Co. 1989) 9

Harris v. Reed, 489 U.S. 255 (1989) 3

In re Long Lake Energy Corp. v. New York Dep't of Envtl. Conservation, 164 A.D.2d 396, 563 N.Y.S.2d 871 (N.Y. App. Div. 1990) 9

In re Sherburne, 154 Vt. 596, 581 A.2d 274 (1990) 2

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 4, 6, 8

Michigan v. Long, 463 U.S. 1032 (1983) 3

Niagra Mohawk Power Corp. v. New York Dep't of Envtl. Conservation, No. 65306, 1993 WL 2586 (N.Y. App. Div. Jan. 7, 1993) 7

Pennsylvania v. City of Harrisburg, 133 Pa. Commw. 577, 578 A.2d 563 (Pa. Commw. Ct. 1990) 9

Yee v. City of Escondido, —— U.S. ——, 112 S. Ct. 1522 (1992) 10

STATUTES

16 U.S.C. §§ 791-823 (1988) 9

33 U.S.C. § 1313 (1988) 3, 4

33 U.S.C. § 1341(a) (1988) ..... *passim*

33 U.S.C. § 1341(d) (1988) ..... *passim*

33 U.S.C. § 1370 (1988) 4

TABLE OF AUTHORITIES—Continued

REGULATIONS	Page
40 C.F.R. § 131.2 (1992)	4, 5
40 C.F.R. § 131.3(b) (1992)	4
40 C.F.R. § 131.6(a) (1992)	4
40 C.F.R. § 131.6(c) (1992)	4, 5
40 C.F.R. § 131.6(f) (1992)	5
40 C.F.R. § 131.10 (1992)	4
40 C.F.R. § 131.11 (1992)	4
40 C.F.R. § 131.11(a) (1992)	4
48 Fed. Reg. 51400 (1983)	4
Vermont WQS § 3-01 (1987)	5
Vermont WQS § 3-03 (1987)	2, 5
MISCELLANEOUS	
American Heritage Dictionary (Second College Ed. 1982)	5
EPA Water Quality Standards Handbook (December 1983)	5

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and SIERRA CLUB

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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REPLY BRIEF FOR PETITIONER

The questions presented by Simpson in its Petition concern the scope of state authority under a federal statute, § 401 of the Clean Water Act, 33 U.S.C. § 1341 (1988) ("CWA"). Simpson contended in the Supreme Court of Vermont that the aesthetics of a cascading dam were not relevant to Vermont's authority to condition water quality certificates issued under § 401 (Br. Op. App. 11a, 58a-62a). The State Supreme Court expressly decided this federal question adversely to petitioner (Pet. App. 3a-4a).

1. Respondents' contention (Br. Op. 6-8) that the holding of the Vermont Supreme Court was based upon an adequate alternative state ground—that the water quality certificate's spillage condition was necessary to correct a downstream dissolved oxygen ("DO") deficiency—is incorrect. In affirming the judgment of the Vermont Su-

perior Court, the State Supreme Court did not address the DO issue.

The Vermont Supreme Court's decision has two analytical parts. The first part discusses and rejects Simpson's request for an alternative remedy—a remand either to the lower court or to the Vermont Department of Environmental Conservation ("DEC") for the purpose of adducing more facts on the DO issue[1] (Pet. App. 1a-4a). The second part sustains the authority of Vermont's certifying agency to consider aesthetics and recreational factors under § 401 and the adequacy of the evidence to support the spillage requirement under this standard. The entirety of the second part is in one paragraph:

> Plaintiffs lastly contend that the spillage requirement was not supported by the evidence and that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement. The Clean Water Act allows the state to impose conditions in a § 401 certification to ensure applicant's compliance with certain criteria, including "any other appropriate requirement of State law." 33 U.S.C. § 1341 (d). Vermont's water quality standards promulgated in accordance with this Act require that the Connecticut River be managed for "water of a quality which consistently exhibits good aesthetic value . . . and recreation." Vermont Water Quality Standards § 3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement. See *In re Sherburne*, 154 Vt. 596, 607, 581 A.2d 274, 280

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[1] At the outset of its opinion, the Vermont Supreme Court summarized its decision:

> [Plaintiffs] seek to set aside continuous spillage conditions in a § 401 water quality certification, or, *alternatively*, seek a remand to the DEC for consideration of additional evidence, or a remand to superior court for de novo review. We affirm. (emphasis added) (Pet. App. 1a).

(1990) (added deference afforded agency determinations in highly technical fields). (Pet. App. 3a-4a).

From the foregoing, it is clear that the court never expressly addressed the DO issue, even though Simpson vigorously argued the question (Br. Op. App. 44a-49a). Respondents highlight the court's statement that the "spillage requirement was amply supported by the evidence" (Pet. App. 3a). That statement, however, is immediately preceded by the court's conclusion that § 401(d) authorizes aesthetic and recreational conditions. The court then concludes that the evidence is sufficient because it has held, erroneously, that aesthetics and recreation are relevant criteria under § 401. The context also shows that the phrase "ease of administration and monitoring were fostered" refers to aesthetics and recreation, not the DO issue the court was invited to decide. The absence of any statement concerning the DO issue creates a conclusive presumption that the State Supreme Court decided the case on the specific federal grounds it discussed. *Coleman v. Thompson*, —— U.S. ——, 111 S. Ct. 2546, 2556-58 (1991).[2]

2. Respondents are mistaken in contending that the reference to preserving "good aesthetic value . . . and recreation" found in the "management objectives" of the Vermont Water Quality Standards ("WQS") (App. 16a) provides an "other appropriate requirement of State law" under § 401(d) (Br. Op. 9-14). This contention reflects a fundamental misunderstanding of the federal-state relationship created by § 303 of the CWA (33 U.S.C. § 1313 (1988)) and implemented in federally-approved state

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[2] To establish an alternative independent state law holding, the state decision must "indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds. . . ." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This "'plain statement' rule" is one of broad application, such that it applies "regardless of whether the disputed state-law ground is substantive . . . or procedural. . . ." *Harris v. Reed*, 489 U.S. 255, 261 (1989) (citations omitted).

Water Quality Standards mandated by the CWA.[3] Pursuant to § 510 of the CWA (33 U.S.C. § 1370 (1988)) a state may adopt "other appropriate requirement[s] of State law" under § 401(d) more stringent than federal standards. It may not, however, require water quality standards that are incompatible with those established under the Act. *Cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

Vermont's WQS were promulgated pursuant to § 303 and were approved thereunder by the Environmental Protection Agency ("EPA") (Pet. 24; Br. Op. 11, n.7). Thus, the standards, as approved, can only be construed within the confines of CWA § 303.

EPA's regulations governing approval of state WQS under CWA § 303 impose a three-part framework on state standards. First, each state is to designate certain uses of each water body. 40 C.F.R. §§ 131.2, 131.6(a), 131.10 (1992). Second, each "designated use" is to be "protected" through adoption of one or more criteria. 40 C.F.R. §§ 131.2, 131.3(b), 131.6(c), 131.11(a) (1992). Although these criteria may be either numeric or narrative, in both formats they must be based on a "sound scientific rationale." 40 C.F.R. § 131.11 (1992).[4]

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[3] Section 303 is reproduced at Pet. App. 57a-66a.

[4] EPA's regulations pertaining to criteria are codified at 40 C.F.R. § 131.11. The preamble explains, *inter alia*, that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 48 Fed. Reg. 51400 at 51402 (1983). Thus, a state may adopt in its WQS any water quality criteria which EPA proposes or "any other criteria for which they have sound scientific support." 48 Fed. Reg. 51400 at 51411 (1983). An EPA handbook elaborates:

> The criteria which are adopted may be numerical or narrative or both. Pollutant-specific numerical criteria may be used when the control of specific pollutants is of concern, and narrative criteria may be applied when the control of either combinations

In other words, criteria must have a basis in objective fact. Subjective aesthetic criteria are plainly incompatible with this requirement. Third, the state's WQS must prevent degradation of existing water quality levels.

Respondents improperly incorporate "designated uses" into "criteria," which are the operative water quality factors dischargers must satisfy. "Designated uses," however, are simply the objectives the state seeks to protect through its water quality criteria. 40 C.F.R. §§ 131.2, 131.6(c). Vermont's WQS define general water quality criteria for all of the state's waters (App. 13a), and specific water quality criteria for the Class B waters in question here (App. 16a). Nowhere in Vermont's criteria, as distinguished from its identification of "designated uses," [5] do the words "aesthetics" or "recreation" appear (App. 13a-16a). EPA's requirements are based on the scheme of the CWA. Under those requirements, scenic aesthetics cannot be included in state criteria because such a standard would have no scientific foundation, and would not relate to water quality.

Indeed, criteria based on scenic aesthetic standards would be amorphous, reflecting only the current aesthetic values of state officials.[6] Such criteria would be incom-

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of pollutants together or individual pollutants not contained in state water quality standards is of concern.

EPA Water Quality Standards Handbook, p. 2-17 (December 1983). *See also* 40 C.F.R. 131.6(f) (1992).

[5] In its WQS, Vermont styles designated uses as "management objectives." (App. 16a; Br. Op. 4, n.6).

[6] According to the American Heritage Dictionary (Second College Ed. 1982), "aesthetic" is defined as:

> **aesthetic** or **esthetic** . . . adj. **1.** Of or pertaining to the criticism of taste. **2. a.** Of or pertaining to the sense of the beautiful: *the aesthetic faculties.* **b.** Artistic: *an aesthetic success.* **3. a.** Having a love of beauty. **b.** *Informal.* In accordance with accepted notions of good taste.

[Continued]

patible with the "clear and identifiable" standards Congress intended to establish in the CWA, because they would vary from time to time according to subjective taste, and thus would be inherently vague and indeterminate. *Cf. International Paper Co. v. Ouellette*, 481 U.S. at 496.

Respondents' conflation of "criteria" and "designated uses" also explains their mistaken conclusion that nonquantitative factors are "appropriate requirement[s] of State law" under § 401(d). Compatibility with the design and purposes of the 1972 amendments to the CWA mandates that such requirements have a scientific basis. This necessarily implies a quantitative foundation, or a reasonable approximation in narrative form. No scientifically based numeric or narrative criteria in the Vermont WQS were invoked in support of the scenic aesthetic standard challenged here.

3. Respondents' argument that there is no conflict among state courts concerning the enforceability of "designated uses" under CWA § 401(d) (Br. Op. 14-17) is a disingenuous attempt to avoid the question presented by the petition. Respondents' assertions rest on their wholly erroneous view that designated uses may function as enforceable criteria. Not only does the decision of the Vermont Supreme Court conflict with the cases enumerated in the petition (Pet. 19-20), but it also conflicts with the latest New York decision. That State's Appellate Divi-

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[6] [Continued]

Where, as here, one is concerned with preserving a scientific, measurable standard, the definition of "aesthetics" is equally revealing:

> **aesthetics** or **esthetics** . . . n. (*used with a sing. verb*). **1.** The branch of philosophy that provides a theory of the beautiful and of the fine arts. **2.** The theories and descriptions of the psychological response to beauty and artistic experiences. **3.** In the philosophy of Kant, the branch of metaphysics concerned with the laws of perception.

sion has ruled that "any other appropriate requirement of State law" under § 401(d) of the CWA does not include every state provision that indirectly protects water quality in any manner. Environmental requirements not related to water quality, *i.e.*, beyond narrative and numerical criteria required by EPA, are "reserved by the FPA for determination at the Federal level—dam safety, general balancing of economic and other concerns, the effect on wildlife, recreational opportunities and the like." *Niagara Mohawk Power Corp. v. New York Dep't. of Envtl. Conservation*, No. 65306, 1993 WL 2586, slip op. at 3 (N.Y. App. Div. Jan. 7, 1993).

Respondents' discussion of *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274, *review denied*, 726 P.2d 377 (Or. Ct. App. 1986), is incomplete. That case held that a violation of the provisions of the CWA expressly enumerated in § 401 "is the only basis on which the state has authority under the CWA to deny the certificate. The power to issue the certificate is solely a creature of federal law; the state agencies are controlled by that law in their decisions on applications." 717 P.2d at 1278. Because the certificate application had been denied for failure to comply with state and county land use requirements, the Oregon Appellate Court remanded the application to the state certifying agency for reconsideration. In dictum, the court also suggested that land use regulations might bear on water quality conditions under § 401(d) to the extent not superseded by federal law. It therefore directed the state agency to examine the specific relationship of such provisions to water quality. 717 P.2d at 1279. Significantly, the court ruled that § 401(d) "does not, however, allow limitations which are not related to water quality." *Id.*

Respondents also misread *Bangor Hydro Electric Co. v. Board of Environmental Protection*, 595 A.2d 438 (Me. 1991). That case held that a state certifying agency may require an applicant for a § 401 certificate to produce

information relating to the state's designated uses. The Maine Supreme Court carefully ruled, however, that "[w]e need not decide in this appeal to what extent the Board may condition water quality certification upon measures designed to promote the future attainment of designated uses," because that issue was not before the court. 595 A.2d at 443.

Simpson has emphasized the conflict among the states concerning the scope of § 401 because that conflict is causing enormous delay and expense in the relicensing of nearly 200 existing hydro-electric projects and the development of future projects. The conflict should be resolved promptly.

4. Respondents' contention that Simpson's petition raises issues not adequately preserved in the Vermont Supreme Court (Br. Op. 18-23) is mistaken. They fail to recognize the proper scope of the federal questions actually presented.[7]

Respondents cannot deny that the State Supreme Court decided, contrary to Simpson's arguments (Br. Op. App. 11a, 58a-62a), that applicable federal law authorizes a spillage requirement based on aesthetics and recreation. It is simply indisputable that the construction of a federal statute like § 401 of the CWA, and, indeed all interstate water issues generally, are matters of federal law. *Arkansas v. Oklahoma*, —— U.S. ——, 112 S. Ct. 1046, 1052-54 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987).[8]

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[7] Respondents miss the mark in contending (Br. Op. 19-20) that Simpson did not preserve the question whether spillage over a dam is a discharge under the CWA. That issue was not litigated and the petition disavows presenting it (Pet. 23, n.51).

[8] Respondent Sierra Club argued in the Vermont Superior Court:

> [Simpson's predecessor] is conceding that the question in this case is whether the continuous spill requirement is necessary to meet the water quality standards. Well, that necessarily involves federal issues as to what is included in a water quality standard. (Tr. January 16, 1991, p. 34, lines 19-23).

The § 401 issue here arises in the context of Simpson's application for relicensing of its hydroelectric facility under Part I of the Federal Power Act ("FPA"). 16 U.S.C. §§ 791-823 (1988). In its petition Simpson has further developed the § 401 issue by explaining the implications of the Vermont Supreme Court's decision. That decision has the direct consequence of extending the state's permitting functions beyond the confines of § 401 of the CWA into hydroelectric licensing responsibilities reserved to the Federal Energy Regulatory Commission ("FERC") under the FPA.

In its brief to the Vermont Supreme Court, Simpson specifically adverted to FERC's approval of cases that have rejected other states' attempts to go beyond § 401, which focuses only on water quality issues (Br. Op. App. 60a-61a). In supporting that argument Simpson cited a number of cases specifically discussing FERC's role under the FPA: *Fourth Branch Assoc. v. Dep't. of Envtl. Conservation*, 550 N.Y.S. 2d 769, 146 Misc.2d 334 (N.Y. Sup. Ct., Albany Co. 1989); *In re Long Lake Energy Corp. v. New York Dep't. of Envtl. Conservation*, 164 A.D.2d 396, 563 N.Y.S.2d 871 (N.Y. App. Div. 1990); and *Pennsylvania v. City of Harrisburg*, 133 Pa. Commw. 577, 578 A.2d 563 (Pa. Commw. Ct. 1990).

Simpson's argument concerning the interrelationship between the FPA's hydroelectric licensing scheme and state water quality certification under the CWA is properly contained within the federal issue decided below—the scope of state conditioning authority under § 401. Respondents themselves recognize that Simpson's request for water quality certification from the Vermont DEC was part of the relicensing process for the Gilman Hydroelectric Facility which Simpson is pursuing at the FERC (Br. Op. 3). As this Court has held, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to

the precise arguments they made below." *Yee v. City of Escondido*, —— U.S. ——, 112 S. Ct. 1522, 1532 (1992).

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and this reply brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 22, 1993

APPENDIX

APPENDIX

EXCERPTS FROM
VERMONT WATER QUALITY STANDARDS
EFFECTIVE JANUARY 8, 1987

STATE OF VERMONT
WATER RESOURCES BOARD
Montpelier, Vermont 05602
(802) 828-2871

* * * *

Chapter 1 GENERAL POLICY

Section 1-01. Applicability and Definitions

A. *Applicability*

These Water Quality Standards shall apply to all permit applications including applications for the renewal of permits for existing discharges, which are filed on or after the date upon which the amended standards become effective and to all activities which occur after that date. The Water Quality Standards effective since January 7, 1985 shall apply to all permit applications which are filed before the effective date of these rules.

B. *Definitions*

For the purposes of these Water Quality Standards, the terms below shall have the following meanings unless a different meaning clearly appears from the context.

1. *Accepted agricultural or silvicultural practices* means those practices as defined by the commissioners of agriculture and forests, parks and recreation respectively in accordance with 10 V.S.A. § 1259(f) as being necessary to protect water quality in a manner consistent with the Act.

2. *Act* means the "Vermont Water Pollution Control Act," 10 V.S.A., Chapter 47.

3. *Applicable water quality criteria* means all criteria specified in sections 3-01, 3-05, 3-06 as well as those specified in sections 3-02(B), 3-03(B) and 3-04(B) which are applicable to the classification of the waters in question.

4. *Assimilative capacity* means a measure of the capacity of the receiving waters to assimilate wastes without lowering their quality below the applicable water quality criteria.

5. *Background conditions* means conditions which exist in the absence of human or cultural influences which are not subject to regulation under the Act.

6. *Beneficial values or uses* means any value or use, whether existing or not, which is specified in the management objectives for each class of water as set forth in sections 3-02(A), 3-03(A) and 3-04(A) of these rules.

7. *Board* means the Vermont Water Resources Board, 10 V.S.A. § 1251(1).

8. *Classification* means the water quality classification designated for a specific body of water in accordance with the provisions of 10 V.S.A. § 1253.

9. *Discharge* means the placing, depositing, or emission of any wastes, directly or indirectly, into an injection well or into the waters of the state, 10 V.S.A. § 1251(2).

10. *EPA* means the U.S. Environmental Protection Agency.

11. *Existing discharge* means any discharge to the extent authorized by a valid permit issued under the provisions of 10 V.S.A. § 1263 or § 1265 as of January 7, 1985.

12. *Existing Use* means any beneficial use of water which provides important economic, social or other public benefits and which has occurred on a frequent, regular or consistent basis and any other use made of the water which is compatible with its classification.

13. *Groundwater* means water below the land surface, 10 V.S.A. § 1410 (b)(1).

14. *Indirect discharge* means any discharge to groundwater, whether subsurface, land-based or otherwise, 10 V.S.A. § 1251(15).

15. *Mixing zone* means a length or area within the waters of the state required for the dispersion and dilution of waste discharges adequately treated to meet federal and state treatment requirements and within which it is recognized that specific water uses or water quality criteria associated with the assigned classification for such waters may not be realized. The mixing zone shall not extend more than 200 feet from the point of discharge, 10 V.S.A. § 1251(6).

16. *New discharge* means any discharge not authorized under the provisions of 10 V.S.A. § 1263 as of January 7, 1985 or any increased pollutant loading or demand on the assimilative capacity of the receiving waters from an existing discharge which requires the issuance of a new or amended permit.

17. *Nonpoint source waste* means waste which reaches the waters of the state via direct or indirect discharge in a diffuse manner from sources including, but not limited to, overland runoff from construction sites, or as a result of agricultural or silvicultural practices.

18. *Nonpolluting waste* means those wastes which prior to treatment do not have the potential to result in an undue adverse effect on any existing use, beneficial value or use, or the quality of the receiving waters.

19. *Permit* means a Discharge Permit issued in accordance with the provisions of 10 V.S.A. § 1263.

20. *Person* means an individual, partnership, public or private corporation, municipality, institution, or agency of the state or federal government, including any officer or governing or managing body of a partnership, association, firm or corporation, 10 V.S.A. § 1251(8).

21. *Public Interest* means that which shall be for the greatest benefit to the people of the state as determined by the Board in accordance with the criteria set forth in subsection (e) of section 1253 of the Act.

22. *Publicly owned treatment works (POTW)* means any government owned device or system used in the storage, treatment, disposal or recycling of wastes.

23. *Receiving waters* means all waters adjacent to a discharge and all adjacent or downstream waters whose quality may be affected by that discharge.

24. *Seven Day Low Flow, Ten Year Return Period (7Q10)* means that instantaneous flow which is equal to the lowest mean flow for seven consecutive days which has a 10% chance of occurring in any given year.

25. *Secretary* means the Secretary of the Agency of Environmental Conservation or his authorized representative, 10 V.S.A. § 1251(11).

26. *Stormwater runoff* means natural precipitation which does not infiltrate into the soil, including any material dissolved or suspended in such water. Stormwater runoff does not include wastes from combined sewer overflows.

27. *Toxic wastes* means those wastes or combinations of wastes which, after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of available information cause death, disease, behaviorial abnormalities, cancer, genetic mutations, physiological or reproductive malfunctions or physical deformations in such organisms or their offspring.

28. *Undue Adverse Effect*—This phrase shall have its common meaning. In determining undue adverse effect, the Secretary is authorized to make case specific judgments in applying these rules. In making such judgments, the water quality policy set forth in section 1-02, the classification of the waters and any other applicable provisions of these rules shall be considered. Except where the context clearly indicates otherwise, applications or interpretations which are less stringent than the specific provisions of these rules shall not be allowed.

29. *Waste* means effluent, sewage, or any substance or material, liquid, gaseous, solid or radioactive, including heated liquids, whether or not harmful or deleterious to waters, 10 V.S.A. § 1251(12).

30. *Waters* and *Waters of the State* means any river, stream, creek, brook, reservoir, pond, lake, spring, and any body of surface water, artificial or natural, which is contained within, flows through or borders upon the State of Vermont or any portion thereof, 10 V.S.A. § 1251(13).

Section 1-02. General Water Quality Policy (10 V.S.A. § 1250)

It is the policy of the state of Vermont to:

(1) protect and enhance the quality, character and usefulness of its surface waters and to assure the public health;

(2) maintain the purity of drinking water;

(3) control the discharge of wastes to the waters of the state, prevent degradation of high quality waters and prevent, abate or control all activities harmful to water quality;

(4) assure the maintenance of water quality necessary to sustain existing aquatic communities;

(5) provide clear, consistent and enforceable standards for the permitting and management of discharges;

(6) protect from risk and preserve in their natural state certain high quality waters including fragile high-altitude waters, and the ecosystems they sustain;

(7) manage the waters of the state to promote a healthy and prosperous agricultural community, to increase the opportunities for use of the state's forest, parks and recreational facilities, and to allow beneficial and environmentally sound development.

It is further the policy of the state to seek over the long term to upgrade the quality of waters and to reduce existing risks to water quality.

Section 1-03. Anti-Degradation Policy

A. *General Policy*

The Board shall establish water quality classifications in accordance with the statutory provisions of the Act and in a manner consistent with Sections 1-02 and 1-03 of these rules. To the greatest extent possible the classification of the waters shall identify existing uses, background conditions, and the degree of water quality to be obtained and maintained. Existing water quality classifications shall be maintained unless the Board, after a public hearing, finds that

they are contrary to the public interest except as provided for in 10 V.S.A. § 1253(f).

Those waters whose quality meets or exceeds the water quality criteria specified in sections 3-01, 3-03, 3-05 and 3-06 of these rules and which quality makes an important contribution to the propagation or survival of any beneficial species of aquatic biota at any period in their life history within any of the 17 planning basins identified in Chapter 4 of these rules, constitute high quality waters which have significant ecological value and therefore are eligible for reclassification to Class A in accordance with the provisions of 10 V.S.A. § 1253(c) and § 1253(f).

The aquatic biota shall be considered to have been significantly altered whenever a discharge or combination of discharges results in a change in the number or diversity of aquatic biota that exceeds the range of natural variation within the receiving waters where such a change results in a measurable alteration of the essential biological characteristics of the receiving waters. The natural variation of aquatic biota shall be determined by sampling and statistical protocols established by the Secretary as provided for in section 2-01(f) of these rules.

The Secretary shall manage the waters of the State in accordance with the Water Quality Standards to protect, maintain and improve water quality in such a manner that the beneficial values and uses associated with their classification are attained.

In those waters where background conditions result in an in-stream level of water quality below any applicable water quality criterion, compliance with the in-stream condition may be allowed when specifically authorized by the terms of a permit, provided that the quality of the receiving waters is not reduced. All other waters, except mixing zones, shall be managed

so that, at a minimum, a level of water quality compatible with all beneficial values and uses associated with the assigned classification are obtained and maintained.

Existing instream uses and the level of water quality necessary to protect those existing uses shall be maintained and protected.

B. *Protection of High Quality Waters*

For all waters where the existing quality generally exceeds one or more of the following applicable water quality criteria: dissolved oxygen, fecal coliform, color or turbidity, that high quality shall be maintained and protected in the public interest to the fullest extent possible.

1. Consistent with the requirements set forth in subsection B(2) below, a limited reduction in the higher quality of such waters may be allowed only when it is shown that:

   (a) The adverse economic or social impacts on the people of the state specifically resulting from the maintenance of the higher quality of the waters are substantial and widespread, and

   (b) Are not warranted by the economic, social and other benefits to the people of the state resulting from the maintenance of such a higher level of water quality.

2. Any decision to allow a limited reduction in high quality waters shall be consistent with the following requirements:

   (a) Only that degree of reduction in the higher quality waters which is necessary to comply with the above criteria, shall be allowed, and

(b) That degree of water quality which is necessary to maintain and protect all existing uses as well as all applicable water quality criteria of the receiving waters shall be maintained.

C. *Protection of Outstanding Resource Waters*

The Board may by rule designate certain waters as Outstanding Resource Waters. Outstanding resource waters are those Class A or B waters which constitute an exceptional state or national resource or which have exceptional recreational or ecological significance. The existing high quality of waters so designated by the Board shall be protected and maintained.

Section 1-04. Discharge Policy

A. *Discharge Criteria*

In addition to the other provisions of these rules, new discharges of wastes may be allowed only when all the following criteria are met:

1. The proposed discharge is in conformance with all applicable provisions of these rules including the classification of the receiving waters adopted by the Board as set forth in Chapter 4 of these rules.

2. There is no alternative method of, or location for, waste disposal which would have a lesser impact on water quality including the quality of groundwater, or if there is such an alternative method or location, it would be clearly unreasonable to require its use.

3. The design and operation of any waste treatment or disposal facility is adequate and sufficiently reliable to protect all beneficial values

and uses and to insure compliance with these rules and with all applicable state and federal treatment requirements and effluent limitations.

4. Except as provided for in 10 V.S.A. § 1259(d) and (f), the discharge of wastes other than non-polluting wastes and stormwater runoff is prohibited in Class A waters regardless of the degree of treatment provided.

5. Except as provided for in 10 V.S.A. § 1259(d), (e) and (f), the discharge of wastes that, prior to treatment, contained organisms pathogenic to human beings into Class A or Class B waters is prohibited.

6. The receiving waters will have sufficient assimilative capacity to accommodate the proposed discharge.

7. Assimilative capacity has been allocated to the proposed discharge consistent with the classification in Chapter 4 of these rules and the priorities established in subsection B below.

8. The withdrawal of water from, or the discharge of wastes to the thermocline or hypolimnion of any lake in a manner that may result in an undue adverse effect on any existing use or on any beneficial value or use is prohibited.

9. The indirect discharge of sewage into Class B waters will not pose more than a negligible risk to public health. Compliance with this criterion shall include an assessment of both the level and reliability of treatment achieved and the impact of the discharge on the water quality of the receiving waters.

B. *Assimilative Capacity Priorities*

The capacity of the waters of the State to assimilate both the discharge of wastes and the impact of other activities which may adversely affect water quality, and at the same time to be maintained at a level of water quality which is compatible with their classification, is finite. A portion of the assimilative capacity may be held in reserve to provide for future needs, including the abatement of future sources of pollution and future social and economic development.

Accordingly, the assimilative capacity of the waters of the State shall be carefully allocated in accordance with both the priority rankings established below and, when applicable, the "Wasteload Allocation Process" as adopted by the Secretary, to accommodate the following:

1. Existing discharges from publicly owed treatment works (POTW) treating existing sources of waste.
2. Existing discharges from privately owned treatment works treating existing sources of waste.
3. Increased or new discharges from POTW which are attributable to the treatment of existing sources of pollution from existing development.
4. New discharges from existing development which have become a source of pollution.
5. New discharges from POTW treating sources of waste from new development which is within the area served by the treatment facility and which occurs at a rate associated with the normal incremental growth of the area.
6. New discharges from POTW treating new sources of waste from new development which is not within the area served by the treatment facility

but which occurs at a rate associated with the normal incremental growth of the area.

7. New discharges from public or privately owned treatment works treating new sources of waste from new development which occurs at a rate not associated with the normal incremental growth of the area.

* * * *

Chapter 3 DETERMINATION OF CRITERIA

Section 3-01 Water Quality Criteria—General

The following water quality criteria shall apply to all waters, except mixing zones, regardless of their classification:

1. *Dissolved Oxygen*

   a. *Cold Water Fish Habitat*—Not less than 7 mg/l or 75 percent saturation at all times, nor less than 95 percent saturation during late egg maturation and larval development of salmonids in areas which the Secretary determines are salmonid spawning or nursery areas important to the establishment or maintenance of the fishery resource. Not less than 6 mg/l or 70 percent saturation at all times in all other waters designated as a cold water fish habitat.

   b. *Warm Water Fish Habitat*—Not less than 5 mg/l or 60 percent saturation at all times.

2. *Temperature*

   a. *General*

      The change or rate of change in temperature, either upward or downward, shall be controlled so as to prevent any undue adverse effect on aquatic biota, fish and wildlife.

b. *Cold Water Fish Habitat*

The total increase in temperature from background conditions due to all discharges and activities shall not at any time exceed 1.0°F except as provided for in paragraph (d) below.

c. *Warm Water Fish Habitat*

The total increase in temperature from background conditions due to all discharges and activities shall not at any time exceed the values derived from tables 1 or 2 except as provided for in paragraph (d) below.

Table 1. Rivers, Streams, Brooks and Creeks

Background temperature	*Total allowable increase above background temperature*
Above 66°F.	1°F.
63° to 66°F.	2°F.
59° to 62°F.	3°F.
55° to 58°F.	4°F.
Below 55°F.	5°F.

Table 2. Lakes, Ponds, Reservoirs and other waters

Background temperature	*Total allowable increase above background temperature*
Above 60°F.	1°F
50°F—60°F.	2°F
Below 50°F.	3°F

d. *Assimilation of Thermal Wastes*

The Secretary may, by permit condition, specify temperature criteria which exceed the values spec-

ified above in order to authorize discharges of thermal wastes when it is shown that:

(1) The discharge will comply with all other applicable provisions of these rules.

(2) A mixing zone of 200 feet in length is not adequate to provide for assimilation of the thermal waste.

(3) After taking into account the interaction of thermal effects and other wastes, that the higher temperature will not result in thermal shock or have an undue adverse effect on aquatic biota, fish or wildlife or any beneficial values or uses associated with the classification of the receiving waters.

3. *Nutrients*—No increase which would accelerate eutrophication or result in concentrations that may stimulate the growth of aquatic plants, fungi or bacteria, in a manner which has an undue adverse effect on any beneficial values or uses.

4. *Aquatic Habitat*—No change from background conditions which would have an undue adverse effect on the composition of the aquatic biota, the physical or chemical nature of the substrate or the species composition or propagation of fishes.

5. *Sludge deposits or solid refuse*—None

6. *Settleable solids, floating solids, oil, grease, scum, or total suspended solids*—None in such concentrations or combinations which would have an undue adverse effect on any beneficial values or uses.

* * * *

Section 3-03. Class B Waters

A. *Management Objectives*

Class B waters shall be managed to achieve and maintain a high level of quality, which is compatible with the following beneficial values and uses:

1. *Values*—Water which is of a quality which consistently exhibits good aesthetic value and provides high quality habitat for aquatic biota, fish and wildlife.

2. *Uses*—Public water supply with filtration and disinfection; irrigation and other agricultural uses; swimming, and recreation.

B. *Water Quality Criteria for Class B Waters*

1. *pH*—Values shall be maintained within the range of 6.5 and 8.0. The change or rate of change in pH either upward or downward resulting from the discharge of wastes shall be controlled so as to prevent any undue adverse effect on aquatic biota, fish or wildlife.

2. *Turbidity*

   a. *Cold Water Fish Habitat*—Not to exceed 10 NTU.

   b. *Warm Water Fish Habitat*—Not to exceed 25 NTU.

3. *Fecal Coliform*—Not to exceed 200 organisms/100 ml except that the Secretary may, by permit condition, waive compliance with the fecal coliform criterion during all or any portion of the period between October 31st and April 1st, provided that a health hazard is not created. The Secretary shall provide written notice to the Vermont Department of Health prior to issuing a permit

waiving compliance with the fecal coliform criterion.

4. *Color*—Not to exceed 25 standard color units.

5. *Taste and Odor*—None in such concentrations that would have an undue adverse effect on beneficial values or uses or on the taste or odor of fish.

* * * *

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10 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF 1

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Arnold Irrigation District v. Department of Environmental Quality, 717 P.2d 1274 (Or. App. 1986) 3

Bangor Hydro-Electric Co. v. Board of Envtl. Protection, 595 A.2d 438 (Me. 1991) 3

State of Washington, Department of Ecology v. PUD No. 1, 121 Wash.2d 179, Wash. Sup. Ct. No. S8272-6 (April 1, 1993), 1993 Wash. LEXIS 86 ..... *passim*

STATUTES

Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-2623 (1988)

§ 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) 2

§ 401(d), 33 U.S.C. § 1341(d) ..... *passim*

Federal Power Act ("FPA"), 16 U.S.C. §§ 791-828 (1988) 4, 5, 6

REGULATIONS

Supreme Court Rule 15.7 1

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Respondents State of Vermont Department of Environmental Conservation (DEC) and Sierra Club submit this supplemental brief pursuant to Rule 15.7 to draw the Court's attention to a recent decision by the Supreme Court of the State of Washington. In *State of Washington, Department of Ecology v. PUD No. 1*, 121 Wash.2d 179, Wash. Sup. Ct. No. S8272-6 (April 1, 1993), 1993 Wash. LEXIS 86, the court

upheld a minimum flow condition in a water quality certificate issued to a hydroelectric facility pursuant to § 401 of the Clean Water Act ("CWA"). As in the present case, the applicant had challenged the condition, alleging it was beyond the state's authority. The Court's reasoning directly supports the position taken by respondents in Points II, III and IV of their opposition brief (filed February 16, 1993).

1. In Point II respondents argued that, even if the issue presented by petitioner Simpson Paper Company were properly before the Court, certiorari should be denied because § 401(d) of the Clean Water Act authorizes states to condition certificates to ensure compliance with any "appropriate" requirement of State law. Because § 401(d) does not limit the states to consideration of *numerical* water quality standards, it was appropriate for DEC to attach a condition based on the non-numerical (or "designated use") portions of Vermont's water quality standards – specifically, those portions "requir[ing] that the Connecticut River be managed for 'water of a quality which consistently exhibits good aesthetic value . . . and recreation.' " Pet. App. 3a (quoting Vt. WQS § 3-03, reproduced in Petitioner's reply brief, app. 16a). *See also* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

State of Washington directly supports the respondents' position:

> Tacoma argues that water quality standards are limited to pollution and discharges, as opposed to stream flow levels. It is true that the standards include provisions regarding pollution discharges. *See e.g.*, WAC 173-201-045(1)(c)(vii) (criteria for concentrations of toxic, radioactive, and deleterious materials in Class AA waters).

> However, as explained above, the standards' explicitly stated anti-degradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the [water quality] standards' broad purpose, all demonstrate a broad concern for water quality, not just with pollution discharges. *See Bangor Hydro-Electric Co. v. Board of Envtl. Protection,* [595 A.2d 438 (Me. 1991)] (water quality standards would be a nullity if state could not consider designated uses).

121 Wash.2d at 188, 1993 Wash. LEXIS 86, *17-18. *See also* 121 Wash.2d at 192, 1993 Wash. LEXIS 86, *25.

Indeed, the court held that as long as a condition relates to water quality, it need not be based on a water quality *standard* at all:

> We conclude that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. We agree with the *Arnold* court[1] that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates.

State of Washington, 121 Wash.2d at 191-92, 1993 Wash. LEXIS 86, *24. *A fortiori,* since the spillage condition imposed by the Vermont DEC not only related to water quality,[2] but was actually based on a specific state water quality *standard,* that condition passes muster under § 401(d).

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[1] *See Arnold Irrigation District v. Department of Environmental Quality,* 717 P.2d 1274 (Or. App. 1986).

[2] *See* Pet. App. 26a (Vermont § 401 certificate makes clear that aesthetics and recreation were invoked as they relate to "protection of downstream water quality").

2. *State of Washington* lends further support to Point III of the DEC and Sierra Club brief. The Washington Supreme Court joins the ranks of several other state courts of last resort that have addressed the scope of § 401 of the Clean Water Act. None has held that non-numerical water quality standards are unenforceable under § 401(d) of the Clean Water Act.

3. Finally, in Point IV, the DEC and Sierra Club responded to Simpson's claim that "Vermont's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the [Federal Power Act] FPA by implication."[3] Pet. 26-27. *State of Washington* holds that a state may properly factor its designated uses into the setting of § 401(d) conditions, *see* pp. 2-3, *supra*, and further holds that such action by a state does not conflict with the FPA:[4]

> Considering first field preemption, there is neither an express nor an implied indication of any congressional intent to occupy the field so as to preclude states from exercising their authority and fulfilling their obligations under the Clean Water Act. When the FPA and the

---

[3] The respondents maintain that this issue is not properly before the Court because Simpson did not raise it before any Vermont court. Joint Response 20-21. Moreover, there is nothing "impli[ed]" about § 401. Its terms and the requirements of the CWA are explicit. *Id.*

[4] In apparent recognition that the interplay between the CWA and the FPA does not raise preemption issues, Simpson limited its arguments to a claimed conflict between the FPA and the CWA. *State of Washington* addressed this issue in the context of a preemption claim, but its analysis of whether § 401 conflicts with the FPA is nonetheless dispositive.

Clean Water Act are considered together, the comprehensive scheme that emerges is one in which Congress left room for the states to supplement the FPA through the section 401 certification process. Enforcement of state laws is part of the federal scheme inasmuch as section 401 of the Act requires states to assure compliance with appropriate state laws. The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority. Consequently there is no basis for finding field preemption here.

As regards conflict preemption, there is no actual conflict between Ecology's action and the FPA. Compliance with Ecology's streamflow condition and the FPA is physically possible, and fulfillment of that condition does not stand as an obstacle to the accomplishment and execution of Congress's purposes. Indeed, exactly the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process. Moreover, finding conflict preemption under circumstances such as those presented here would have the effect of requiring Ecology to guess which elements of the 401 certificate might conflict with actions FERC might take at a later time, and then decline to condition the certificate based on this guess in violation of Ecology's mandate under the Act. We cannot believe Congress could have intended to create such an administrative nightmare.

State of Washington, 121 Wash.2d at 196-97, 1993 Wash. LEXIS 86, *34-35. In short, the requirements of the CWA are not implied, but explicit, and in any event are fully consistent with the FPA.

CONCLUSION

Even if this Court could ignore the adequate alternate ground raised in Point I of the respondents' brief,[5] *State of Washington* provides strong support for respondents' position that the challenged spillage condition was well

[5] In Point I, the respondents argued that certiorari is improper because the Vermont Supreme Court's judgment rests on an adequate alternate ground unchallenged by Simpson. The respondents continue to assert that this adequate alternate ground should prevent the Court from even reaching the arguments raised in Simpson's petition.

within the scope of Vermont's authority under § 401. Simpson's petition for a writ of certiorari should therefore be denied.

Dated: April 28, 1993

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.7 of this Court's Rules, petitioner Simpson Paper (Vermont) Company submits this Supplemental Brief addressing the Brief for the United States as Amicus Curiae ("U.S. Br.") filed on June 9, 1993 in response to the Court's order of March 8, 1993 inviting the Solicitor General to submit the views of the United States.

1. The Solicitor General recognizes the importance of the issue presented by observing that "[t]he scope of a

State's power under Section 401 presents issues of substantial importance to the United States, both in enforcing the Clean Water Act and in licensing and permitting of hydroelectric and other projects" (U.S. Br. 9). His contention that this case is not an appropriate vehicle for considering these issues, however, rests upon a misapprehension of the judgment of the Vermont Supreme Court.

2. The state supreme court's judgment did not clearly and expressly indicate that it was "alternatively based on bona fide separate, adequate and independent" [1] determination that the continuous spillage requirement was necessary to ensure compliance with Vermont's dissolved oxygen ("DO") standards. The court instead singled out for discussion the elements in Vermont Water Quality Standards § 3-03 concerning management of the Connecticut River for "water of a quality which consistently exhibits good aesthetic value . . . and recreation (Pet. App. 3a). As demonstrated in Simpson's Reply Brief at 2-3, its decision never linked those requirements with the DO issue, despite the intense contest on that matter throughout the case.

3. The Solicitor General purports to find support for his position in the rulings by the Vermont Department of Environmental Conservation (DEC) and the state trial court (U.S. Br. 10-12). But the issue here is what was decided by the Vermont Supreme Court, a distinction the United States clearly recognizes (U.S. Br. 12-14).[2]

---

[1] *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

[2] The government suggests (U.S. Br. 10, n.9) that "there is no occasion in this case to consider whether a state court's affirmance of a state agency's imposition of a condition on a certification under Section 401 might in some circumstances present a question of federal law that is subject to review in this court . . . ." The government's characterization of the question presented (U.S. Br. at (I)), however, is essentially the first question presented by

In fact, the Vermont Supreme Court avoided review of the closely contested DO issue by basing its decision on the "aesthetic" justification.

4. The government's amicus brief is also mistaken in contending that "even if this Court were to grant review in this case and hold that a State may not consider 'aesthetic' factors unrelated to measurable water quality criteria, both the DEC decision and the Vermont Supreme Court's judgment affirming it would be unaffected" (U.S. Br. at 15). Because the Vermont Supreme Court has clearly ruled that a spillage requirement can be properly based on subjective aesthetic factors, its judgment, unless reversed by this Court, could eliminate Simpson's opportunity to seek revision of the § 401 certificate based upon empirical studies and plans showing that appropriate DO levels can be maintained with a reduced spillage requirement.[3] The "aesthetic requirement," as construed and affirmed by the Vermont Supreme Court, would stand as a barrier that could not be breached by any evidence, however strong, regarding measurable water quality conditions. Thus this case is not advisory, but concrete and adversary because a reversal could affect Simpson's rights to seek a revision of its § 401 certificate.

5. The United States suggests that the asethetic requirement is so unclear as to be unworthy of review (U.S. Br. 15-16). That position, however, is contrary to the

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Simpson in its petition. That question goes to the scope of state authority under § 401 of the Clean Water Act and clearly presents a federal question within the meaning of 28 U.S.C. 1257.

[3] In opposing Simpson's assertion that it was entitled to *de novo* review, the DEC in its brief to the Vermont Supreme Court suggested that Simpson would be free to petition the DEC for an amendment to the continuous spillage requirement once Simpson's appeal was denied, based on "any new evidence it considers germane. . ." Joint Brief of the Appellees at 21 & n.11.

State's own view that *the requirement was, as a matter* of law, properly sustained by the Vermont Supreme Court. Vermont clearly contends that "the challenged certification must still be upheld as a valid application of Vermont's power to apply its non-quantitative water quality standards—specifically, that portion of the standards that require 'water of a quality which consistently exhibits good aesthetic value . . . and recreation' " (Jt. Br. in Op. 9-10). Eschewing speculation of the kind set forth in the U.S. amicus brief, the Vermont DEC stands its legal ground. It does not even hint that the aesthetic requirement is based on aesthetic factors related to measurable water quality criteria. Nor could it so contend. There is no evidence in the record linking water quality to aesthetic factors. The judgment of the Vermont Supreme Court rests solely on the legal conclusion that non-quantitative aesthetic factors are valid under § 401. The judgment thus presents a clear question of law as to whether such factors are properly within the scope of state certification authority under § 401.

6. Finally, the Solicitor General errs in his statement that the minimum flow requirement involved in this case "has received a preliminary endorsement by FERC" (U.S. Br. 16). First, there has been no "endorsement" through any order, preliminary or otherwise, by the Commission or by any official exercising decisional authority delegated by the Commission. Under FERC's precedents, the Environmental Assessment cited by the government is only a staff evidentiary document that never itself becomes a license condition or final order.[4] Second, there is pending before FERC's Staff a request by Simpson filed December 14, 1992 seeking a revision of the evidentiary EA which the government mistakenly treats as an agency deter-

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[4] *See e.g., Montana Power Company and Granite County, Montana,* 62 FERC ¶ 61,166 at p. 62,143-144 n.44 (1993); *Pacific Gas & Electric Company,* 59 FERC ¶ 61,098 (1992).

mination. That request is based on (1) three years of monitoring data which show the spillage is not necessary to protect DO, and (2) Simpson's revised water quality management plan, which is designed to ensure DO levels never drop below state standards.

7. Ultimately, the issue here is not, as the Solicitor General appears to contend, whether there is a conflict with FERC action (U.S. Br. 16). The issue concerns which forum, state or federal, has statutory responsibility for determining when aesthetic and other non-water quality conditions should be imposed on the operations of hydroelectric facilities. The government concedes (U.S. Br. 17, n.14) that "if the court were to grant review, it . . . would be relevant to consider the interaction of Section 401 and the statutory provisions governing FERC's licensing authority." That interaction is at the heart of this case. The issue is whether hydroelectric operations are to be governed by FERC's comprehensive balancing of all factors under the Federal Power Act, or by determinations of single-purpose state agencies.

In this regard, the Court may wish to postpone action on this petition for a writ of certiorari until it can fully assess its relationship to the petition for a writ of certiorari in *PUD No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology et al*, Petition for a Writ of Certiorari to the Supreme Court of Washington, No. 92-1911, filed June 1, 1993. The government acknowledges in its brief (U.S. Br. 17 n.15), that the *Tacoma* case presents issues substantially similar to those presented by this case.

For the reasons stated in the Petition for a Writ of Certiorari, Petitioner's Reply Brief and this Supplemental Brief, the Petition for a Writ of Certiorari should be granted. Alternatively, the Court may wish to postpone action on the Petition and consider the case together with the petition in No. 92-1911.

Respectfully submitted,

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(8)

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No. 92-1012

In the Supreme Court of the United States

OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY, PETITIONER

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND SIERRA CLUB

ON PETITION FOR A WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Whether the Vermont Department of Environmental Conservation exceeded its authority under federal law by conditioning a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. 1341, for a federally licensed hydroelectric project on the licensee's attainment of aesthetic and recreational goals.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Oklahoma*, 112 S. Ct. 1046 (1992)	11
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	15
California v. *FERC*, 495 U.S. 490 (1990)	4, 16, 17
Coleman v. *Thompson*, 111 S. Ct. 2546 (1991)	10, 11
Gilman Paper Co., 33 F.P.C. 1021 (1965)	4
Michigan v. *Long*, 463 U.S. 1032 (1983)	10, 11
Niagara Mohawk Power Corp. v. *New York State Dep't of Envtl. Conservation*, 592 N.Y.S.2d 141 (1993), motion for leave to appeal granted (May 11, 1993)	17-18
Summit Hydropower v. *Commissioner of Environmental Protection*, No. CV91-050-26-43 (Conn. Super. Ct. July 20, 1992), appeals pending, Nos. SC12618 & 14619 (Conn.)	17
Vermont v. *New Hampshire*, 289 U.S. 593 (1933)	4
Washington Dep't of Ecology v. *PUD No. 1 of Jefferson County*, 849 P.2d 646 (Wash. 1993), petition for cert. pending, No. 92-1911	17

Constitution, statutes and regulations:

U.S. Const. Art. III	11
Clean Water Act (Federal Water Pollution Control Act), 33 U.S.C. 1251 *et seq.*:	
§ 303, 33 U.S.C. 1313	2
§ 401, 33 U.S.C. 1341	*passim*
§ 401(a), 33 U.S.C. 1341(a)	3
§ 401(d), 33 U.S.C. 1341(d)	3, 17
Federal Power Act, 16 U.S.C. 791a *et seq.*	3, 16
16 U.S.C. 797(e)	3, 4
16 U.S.C. 803(a)(1)	4
16 U.S.C. 808	5

Statute and regulations—Continued: Page

28 U.S.C. 1257 11
40 C.F.R.:
Section 131.3(b) 2
Section 131.3(i) 2
Section 131.6 2
Section 131.6(a) 2
Section 131.6(c) 2
Section 131.6(d) 3
Section 131.10 2
Section 131.11 2
Section 131.12 3

Miscellaneous:

Office of Hydropower Licensing, Div. of Project Review, FERC, *Environmental Assessment for Hydropower License,* Gilman Hydroelectric Project (Apr. 4, 1990) 7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1012

SIMPSON PAPER (VERMONT) COMPANY, PETITIONER

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND SIERRA CLUB

ON PETITION FOR A WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Petitioner Simpson Paper (Vermont) Company challenges a condition included in a water quality certification issued by the Vermont Department of Environmental Conservation. Petitioner sought that certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341, in connection with its filing of an application with the Federal Energy Regulatory Commission for a license to operate a hydroelectric dam facility.

1. a. Section 303 of the Clean Water Act (Federal Water Pollution Control Act), 33 U.S.C. 1313, allows States to adopt "water quality standards" for all navigable waters within the State.[1] A State's water quality standards must encompass three basic elements. See 40 C.F.R. 131.6. First, they must designate the intended "use" for each water body—*e.g.*, whether it is intended for recreational uses, including swimming and fishing. 40 C.F.R. 131.6(a), 131.10. Second, the water quality standards must establish specific "criteria," which may be expressed either as numerical limitations on the presence of certain constituents in the water, or as narrative descriptions of the water quality generally necessary to support the designated use. 40 C.F.R. 131.6(c), 131.11.[2] Finally, the standards must incorporate an "antidegradation" policy designed to prevent the gradual deterioration of the quality of the water body

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[1] The Environmental Protection Agency (EPA) defines water quality standards as—

> provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

40 C.F.R. 131.3(i).

[2] EPA's regulations define "criteria" as—

> elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.

40 C.F.R. 131.3(b).

and the resultant loss of the existing "use." 40 C.F.R. 131.6(d), 131.12.

Section 401(a) of the Clean Water Act, 33 U.S.C. 1341(a), requires any applicant for a federal license or permit for an activity that "may result in any discharge into the navigable waters," to obtain a water quality certification from the State in which the discharge will occur. The certification is intended to ensure that the activity licensed or permitted pursuant to federal law will comply with the State's water quality standards. Under Section 401(d) of the Clean Water Act, 33 U.S.C. 1341(d), the State must list in its certification any effluent and other limitations (as well as monitoring requirements) to assure that the applicant will comply with applicable effluent limitations and other standards under specified provisions of the Clean Water Act, as well as "with any other appropriate requirement of State law"; those limitations then "shall become a condition on any Federal license or permit" that is subject to Section 401.

b. The Federal Power Act, 16 U.S.C. 791a *et seq.*, authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for hydroelectric projects "necessary or convenient * * * for the development, transmission, and utilization of power across, along, from, or in any of the streams * * * over which Congress has jurisdiction." 16 U.S.C. 797(e). In issuing a license, FERC is required to impose conditions necessary to ensure that the project "will be best adapted to a comprehensive plan for improving or developing a waterway * * * for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habi-

tat), and for other beneficial public uses, including * * * recreational and other purposes." 16 U.S.C. 803(a)(1). The Act also directs FERC to "give equal consideration to the * * * protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). See generally *California* v. *FERC*, 495 U.S. 490, 494-495 (1990).

2. This case involves petitioner's application to the Vermont Department of Environmental Conservation (DEC) for a certification under Section 401 of the Clean Water Act in connection with petitioner's operation of the Gilman Project on the Connecticut River.[3] The project dam, which is approximately 300 feet in length, was constructed around the turn of the century. It creates an impoundment that extends 2.9 miles upstream of the dam and that has a surface area of 130 acres. Pet. App. 6a. A license was issued for the project under the Federal Power Act in 1965, retroactive to 1941. *Gilman Paper Co.*, 33 F.P.C. 1021 (1965).[4] In September 1988, petitioner applied to FERC for a new license for the project under the Federal Power Act.[5]

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[3] The boundary between the States of Vermont and New Hampshire is set at the historic low water mark on the Vermont side of the Connecticut River. See *Vermont* v. *New Hampshire*, 289 U.S. 593, 619 (1933).

[4] The Gilman Project previously was owned by the Georgia-Pacific Corporation. After the Project was purchased by petitioner, FERC transferred the license to petitioner in 1992. See Pet. 12 n.25. References herein to "petitioner" include its predecessor, Georgia-Pacific.

[5] The original license expired in 1990. Since January 1991, petitioner has continued to operate the project, in conformity

In August 1988, in anticipation of filing its relicensing application with FERC for the Gilman Project, petitioner filed an application with the Vermont DEC for a certification under Section 401 of the Clean Water Act. DEC rendered its decision on the certification application on July 28, 1989. See Pet. App. 19a-28a. DEC first recited the findings on which its decision was based. See *id.* at 19a-26a. DEC then set forth the conditions it found necessary "[i]n certifying that there is a reasonable assurance that project activities will be conducted in a manner that will not violate applicable water quality standards" (*id.* at 26a). See *id.* at 26a-28a.

DEC was especially concerned about compliance with the State's standards for dissolved oxygen (DO) content downstream of the dam during low summer flows. See Pet. App. 21a-24a. DEC determined that operation of the project strictly on a run-of-river basis—*i.e.*, with discharges at the same rate that water enters the impoundment upstream of the dam (see Pet. 10 n.16)—would not "in and of itself assure [that state water quality] standards will be met." Pet. App. 23a. Rather, DEC found that "210 cfs [cubic feet per second] must be spilled" over the dam during the summer months to satisfy the State's DO standards. *Id.* at 23a-24a. DEC accordingly imposed a condition on its water quality certification requiring petitioner to maintain "[a] minimum instantaneous flow of 210 cfs * * * spilled at the dam during the period June 1 through October 15 to protect downstream water quality." *Id.* at 27a. In addition, in the portion of its decision reciting its findings

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with the terms of the original license, under annual licenses issued by FERC. See Jt. Br. in Opp. 3 & n.2; 16 U.S.C. 808.

(but not in its statement of conditions), DEC found that the required minimum flow "will also serve to restore to a degree the aesthetics of this river reach. This is particularly important during the high public recreational use period." *Id.* at 26a.

3. Petitioner sought judicial review of the certification in state court.[6] Petitioner argued, *inter alia*, (1) that there was not substantial evidence in the record to support DEC's imposition of the minimum-flow requirement, and (2) that DEC erred in taking into account aesthetic factors because, in petitioner's view, Section 401 does not permit a State to impose conditions on a federal license that serve only aesthetic purposes. The trial court affirmed DEC's decision. Pet. App. 5a-18a. It found substantial evidence in the record to support DEC's determination to require the minimum flow of 210 cfs from June 1 to October 15 in order to meet the criteria for DO below the dam, *id.* at 14a-15a, observing that this was the sort of "highly technical matter" on which deference to the administrative judgment is appropriate under Vermont law. *Id.* at 14a. The trial court also noted that DEC had concluded that the minimum flow "was required to safeguard the aesthetic appeal of the river to the numerous persons who use the river for recreation during the specified time period," *ibid.*, and it held that the aesthetic

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[6] We do not question the authority of a state court to review the action of a state agency in issuing the certification contemplated by Section 401 of the Clean Water Act. No questions are presented here concerning the effect to be given in subsequent proceedings before FERC to determinations by the state agency or state court on questions of federal law. See Pet. 17-18.

determination "forms a strong independent basis upon which to uphold the 210 cfs continuous spill requirement." *Ibid.*

The trial court denied petitioner's request to remand the case to DEC for consideration of an alternative method proposed by petitioner for operating the project to meet the State's DO standards; that method would have entailed continuous monitoring of downstream DO conditions during the specified times of the year and spillage of additional water only when there was a measurable DO deficit. Pet. App. 15a-17a. The court explained that petitioner had failed to avail itself of the opportunity to present its alternative plan to DEC, and that petitioner's plan, in any event, "has already been found flawed by an agency with considerable expertise in the area of hydropower management, the Federal Energy Regulatory Commission." *Id.* at 16a. The latter observation referred to the fact that FERC, in an environmental assessment dated April 4, 1990, had rejected petitioner's alternative plan of operation in favor of DEC's minimum-flow requirement. FERC found that the minimum flow requirement is "an easily gaged and monitored parameter, to meet specific future DO goals downstream of the project," while petitioner's proposed plan, "which depends on an unproven predictive water quality model, would be difficult to monitor and enforce for compliance with the goal of maintaining DO at the sag point." *Id.* at 17a (quoting Office of Hydropower Licensing, Div. of Project Review, FERC, *Environmental Assessment for Hydropower License*, Gilman Hydroelectric Project (Apr. 4, 1990)).

4. Petitioner appealed to the Vermont Supreme Court, which affirmed the trial court's judgment in

a four-page "entry order." Pet. App. 1a-4a. As relevant here, the Vermont Supreme Court first recited petitioner's arguments, and then responded with a brief description of the applicable legal framework, followed by a statement of the court's legal conclusions (*id.* at 3a-4a):

> [Petitioner] * * * contend[s] [1] that the spillage requirement was not supported by the evidence and [2] that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for the spillage requirement.[7] The Clean Water Act allows the state to impose conditions in a § 401 certification to ensure applicant's compliance with certain criteria, including "any other appropriate requirement of State law." 33 U.S.C. 1341(d). Vermont's water quality standards promulgated in accordance with this Act require that the Connecticut River be managed for "water of a quality which consistently exhibits good aesthetic value . . . and recreation." Vermont Water Quality Standards § 3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and moni-

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[7] See also Jt. Br. in Opp. App. 11a (reproducing petitioner's brief in the Vermont Supreme Court) (stating issues to be, *inter alia*, whether (1) the minimum flow requirement is "unsupported by substantial evidence in the administrative record," and (2) if the minimum flow could not be "sustained as a necessary water quality restriction," whether it was "beyond * * * [the State's] and the trial court's authority under applicable federal law to base such a spillage requirement alternatively on generalized, nonspecific considerations of 'aesthetics' and/or 'recreation' "); see generally *id.* at 44a-58a, 58a-62a.

toring were fostered by the requirement. See *In re Sherburne*, 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (added deference afforded agency determinations in highly technical fields).

DISCUSSION

Petitioner contends that the Vermont Department of Environmental Conservation erred in imposing a condition on its certification for the Gilman hydroelectric project under Section 401 of the Clean Water Act that is intended to promote aesthetic and recreational values. In petitioner's view, such a condition is entirely unrelated to water quality and is, for that reason, beyond Vermont's authority under Section 401 to impose.

The scope of a State's power under Section 401 presents issues of substantial importance to the United States, both in enforcing the Clean Water Act and in licensing and permitting of hydroelectric and other projects. Those issues might well be appropriate for consideration by this Court in a future case. This case, however, is not the proper vehicle for that purpose.

1. a. The judgment of the Vermont Supreme Court rests on an adequate and independent state ground. The Vermont DEC specifically concluded that the 210 cfs minimum-flow requirement is necessary in order "to protect downstream water quality," Pet. App. 27a—*i.e.*, to ensure compliance with the State's dissolved oxygen (DO) standards downstream of the dam during the low flow period between June 1 and October 15 of each year. See *id.* at 21a-24a. That determination was sustained by the state trial court, which found it supported by substantial evidence in the record, *id.* at 14a-15a, and then by the

Vermont Supreme Court, which concluded that "[t]he DEC spillage requirement was amply supported by the evidence." *Id.* at 3a.

In this Court, petitioner does not challenge DEC's determination that the 210 cfs minimum-flow requirement between June 1 and October 15 is necessary to assure compliance with Vermont's DO standards.[8] Because the judgment of the Vermont Supreme Court sustaining DEC's decision is fully supported by that independent DO-based ground that petitioner does not challenge, it follows that this Court is without jurisdiction to review the judgment below.

b. Petitioner does not dispute that an affirmance of DEC's decision by the Vermont Supreme Court on the ground that the minimum-flow condition was necessary to assure compliance with Vermont's DO standards would constitute an adequate and independent state ground of decision, which would bar review by this Court of any alternative holding by the Vermont Supreme Court that the minimum-flow requirement was appropriate to further purely aesthetic goals. See Pet. 17 n.37 (citing *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983), and *Coleman* v. *Thompson*, 111 S. Ct. 2546, 2556-2558 (1991)); Reply Br. 3.[9] Petitioner argues, however, that the

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[8] Nor does petitioner renew its claim that the case should have been remanded to DEC for consideration of the suitability of petitioner's management plan as an alternative to the minimum-flow requirement for assuring compliance with the State's DO standards.

[9] Because petitioner apparently concedes that an affirmance by the Vermont Supreme Court of DEC's decision on the DO rationale would constitute an adequate and independent *state* ground—and because petitioner does not in any event

Vermont Supreme Court's judgment does not actually rest on that alternative ground; as petitioner reads the decision below, the Vermont Supreme Court did not resolve the DO issue, but instead rested its decision entirely on DEC's determination that the minimum-flow requirement was justified on aesthetic grounds. See Pet. 17; Reply Br. 3. We disagree.

In *Michigan* v. *Long*, this Court announced a general rule that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040-1041; see also *Coleman* v. *Thompson*, 111 S. Ct. at 2555-2559. As we explain below, from our review of the decisions and petitioner's arguments in the lower courts, we believe it is clear under *Michigan* v. *Long* and *Coleman* v. *Thompson* that the Vermont Supreme Court's judgment is fully supported by an adequate and independent state ground.

DEC justified the minimum-flow condition primarily on the basis that it is necessary to assure

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seek review of the Vermont Supreme Court's judgment to the extent it rests on the DO ground—there is no occasion in this case to consider whether a state court's affirmance of a state agency's imposition of a condition on a certification under Section 401 of the Clean Water Act might in some circumstances present a question of federal law that is subject to review in this Court under 28 U.S.C. 1257 and Article III of the United States Constitution. Cf. *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046 (1992).

compliance with the State's DO standards downstream of the dam. DEC devoted the bulk of its discussion to the DO problem (see Pet. App. 21a-24a), and the need to safeguard against a DO deficit was the *only* basis cited by DEC in the portion of its decision that actually imposed conditions (including the minimum-flow condition) on the certification. See *id.* at 27a (prescribing minimum-flow condition "to protect downstream water quality"). The sole reference to "aesthetics" was in two sentences of DEC's antecedent statement of its findings. There, DEC found that the minimum-flow condition "will also serve to restore to a degree the aesthetics of this river reach," which is "particularly important during the high public recreational use period." *Id.* at 26a.

Similarly, the state trial court devoted the bulk of its discussion of the minimum-flow condition to the DO justification announced by DEC and the evidence in the record supporting it. See Pet. App. 7a-12a. The trial court affirmed that ruling, and then stated that DEC's aesthetic determination formed an "independent basis" for DEC's decision. *Id.* at 14a.

Finally, on appeal to the Vermont Supreme Court, petitioner devoted the principal portion of its challenge to DEC's decision on the merits to the DO basis on which DEC relied. Petitioner argued that, under state-law principles governing judicial review of agency action, DEC's decision on that point was not supported by the evidence in the record. See Jt. Br. in Opp. App. 44a-58a. Petitioner further argued that "[i]f" the minimum-flow requirement could not be sustained as a necessary water quality condition to assure compliance with DO standards, it was beyond

DEC's authority to impose for "aesthetic" or "recreation" reasons. *Id.* at 11a; see *id.* at 58a-62a. In our view, the Vermont Supreme Court's decision unquestionably rejects *both* of these arguments.

The one paragraph of the Vermont Supreme Court's opinion that is relevant for present purposes consists of five sentences. See Pet. App. 3a-4a (quoted at pages 8-9, *supra*). The first sentence identifies petitioner's two arguments, just discussed. The next two sentences set forth the applicable legal framework for addressing those two arguments; the second sentence describes Section 401 of the federal Clean Water Act, and the third sentence describes Vermont's water quality standards promulgated in accordance with the Clean Water Act. The fourth sentence then rejects petitioner's challenge to the minimum-flow requirement insofar as it rests on the need to assure compliance with the State's DO standards, concluding that "[t]he DEC spillage requirement is amply supported by the evidence." Pet. App. 3a. The final sentence responds to petitioner's alternative argument, explaining that "[n]ot only were aesthetics and recreation considered relevant," but also that "ease of administration and monitoring were fostered by the requirement." *Ibid.*[10]

The Vermont Supreme Court thus affirmed both of what the trial court regarded (Pet. App. 14a) as

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[10] The Vermont Supreme Court's reference to "ease of administration and monitoring" presumably was to the trial court's adoption of FERC's determination, in rejecting petitioner's proposed management plan, that the minimum-flow requirement is an "easily gaged and monitored parameter, to meet specific future DO goals downstream of the project." Pet. App. 16a-17a.

"independent" bases for DEC's decision.[11] Because petitioner seeks review only on the latter ground—and because the former ground appears to rest entirely on state law (see page 12 and note 9, *supra*; Jt. Br. in Opp. App. 44a-58a)— the judgment of the Vermont Supreme Court is fully supported by, and therefore rests on, adequate and independent state grounds. As such, it is beyond the jurisdiction of this Court to review.

2. Even if we assume, *arguendo*, that this Court has jurisdiction to review the Vermont Supreme Court's judgment, this case would not, in our view, present an appropriate occasion on which to consider whether (and, if so, in what manner) a state agency may consider "aesthetic" factors in imposing conditions on a certification under Section 401 of the Clean Water Act. At the very least, DEC's certification decision makes clear that, in DEC's view, the minimum-flow condition was fully justified by the need

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[11] Petitioner errs in contending (Reply Br. 3) that the Vermont Supreme Court "never expressly addressed the DO issue." To be sure, the court did not use the term "DO" or "dissolved oxygen." But it is clear from the structure of the court's opinion and the way in which petitioner briefed the case that the court's holding (in the fourth sentence of the relevant paragraph) that "[t]he DEC spillage requirement was amply supported by the evidence" responded to petitioner's argument in its brief that the record did not support the DO basis for the condition. See Jt. Br. in Opp. App. 44a-58a. Moreover, the first sentence of the relevant paragraph in the court's opinion, in which the court identified petitioner's two contentions on the merits, makes clear that this DO/evidence-in-the-record issue was distinct from the basically legal, rather than evidentiary, issue of whether Section 401 of the Clean Water Act permitted DEC to consider aesthetic and recreational factors in imposing the minimum-flow condition.

to assure compliance with Vermont's DO standards, and the courts below sustained that reasoning. Accordingly, even if this Court were to grant review in this case and hold that a State may not consider "aesthetic" factors unrelated to measurable water quality criteria, both the DEC decision and the Vermont Supreme Court's judgment affirming it would be unaffected. As a result, the judgment below would have to be regarded for present purposes as correct. Because this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956), the view expressed in the opinion below regarding the relevance of aesthetic factors does not warrant certiorari in this case.

There are still further reasons why that issue is not suitably presented for review in this case. First, it is not clear precisely what DEC meant by its reference to "the aesthetics of this river reach." Pet. App. 26a.[12] DEC might have had in mind the need to preserve a certain minimum level of water in the river so that the scenic vista of the river would be pleasing. Alternatively, DEC might have had in mind aesthetics related to the quality of the water itself—*e.g.*, the odor that could be emitted if the DO content of the water was reduced to a level that would lead to releases of hydrogen sulfide, which are associated with low levels of dissolved oxygen. This Court should not consider the difficult and potentially fact-dependent questions concerning the relevance of aesthetic factors in the issuance of a state certifica-

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[12] Like respondents (Jt. Br. in Opp. 10), we believe this reference, on its face, focuses on (or at least includes) downstream aesthetics, not merely aesthetics in viewing the dam itself, as petitioner suggests (see Pet. 15, 17-18, 23-24).

tion under Section 401 in the absence of a clear explication by the state agency and state courts of the basis for the challenged certification condition.[13]

Second, the minimum-flow requirement that petitioner challenges in this case has received a preliminary endorsement by FERC. In rejecting petitioner's request for a remand to DEC for consideration of its alternative management plan, the trial court referred to the conclusion in FERC's environmental assessment that the minimum-flow requirement could be "easily gaged and monitored," while petitioner's alternative plan, "which depends on an unproven predictive water quality model, would be difficult to monitor and enforce for compliance with the goal of maintaining DO." Pet. App. 16a, 17a. The trial court then adopted FERC's opinion as its own, stating (*id.* at 17a):

> The court sees no reason to doubt FERC's expertise in this area, finds its conclusions to be supportable, and accepts as fact FERC's negative scientific assessment of [petitioner's] proposal.

Thus, in the context of this case, petitioner cannot credibly claim that the DEC's imposition of the minimum-flow condition presents any ripe conflict with federal law or with actions taken by FERC in its administration of federal law.[14]

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[13] We likewise are reluctant to express a view on those questions in the highly abstract context of this case.

[14] Petitioner contends (Pet. 25-29) that the Vermont Supreme Court's "expansive" view of a State's authority under Section 401 would allow States to circumvent the primacy of the federal licensing scheme set forth in the Federal Power Act, 16 U.S.C. 791a *et seq.*, and recently reaffirmed in *California* v. *FERC*, 495 U.S. 490 (1990). As respondents point

For the foregoing reasons, review is not warranted in this case.[15]

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out (Jt. Br. in Opp. 20-21), however, petitioner did not make an argument based on the Federal Power Act in the Vermont Supreme Court, and that court did not discuss the Federal Power Act. That Act therefore does not furnish an independent basis for review in this case. Of course, if the Court were to grant review, it nonetheless would be relevant to consider the interaction of Section 401 and the statutory provisions governing FERC's licensing authority.

[15] On June 1, 1993, a petition for a writ of certiorari was filed seeking review of the decision of the Washington Supreme Court in *Washington Dep't of Ecology* v. *PUD No. 1 of Jefferson County*, 849 P.2d 646 (Wash. 1993). See *PUD No. 1 of Jefferson County & City of Tacoma* v. *Washington Dep't of Ecology*, petition for cert. pending, No. 92-1911. The Washington Supreme Court in that case addressed many of the issues petitioner attempts to raise in this case, including the interaction of Section 401 of the Clean Water Act and FERC's licensing authority under the Federal Power Act and *California* v. *FERC*. See 849 P.2d at 653-657. The Washington Supreme Court also considered the scope of the reference in Section 401(d) of the Clean Water Act, 33 U.S.C. 1341(d), to "any other appropriate requirement of State law" (see 849 P.2d at 651-653), an issue that is not involved in this case. No response has yet been filed to the certiorari petition in No. 92-1911, and we express no view at this time on whether the Court should grant review in that case.

In *Summit Hydropower* v. *Commissioner of Environmental Protection*, No. CV91-050-26-43 (Conn. Super. Ct. July 20, 1992), appeals pending, Nos. SC12618 & 14619 (Conn. argued May 4, 1993), the state agency also conditioned its certification under Section 401 on a minimum-flow requirement. Unlike the condition at issue in this case, however, the minimum-flow requirement in *Summit Hydropower* was imposed solely for aesthetic purposes; Connecticut conceded that the project would otherwise meet water quality requirements. A case raising similar issues is also pending before the New York Court of Appeals. See *Niagara Mohawk*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Power Corp. v. *New York State Dep't of Envtl. Conservation*, 592 N.Y.S.2d 141 (1993), motion for leave to appeal granted (May 11, 1993).

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